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No. 08-_____

IN THE

Supreme Court of the United States

JOSEPH AFANWI,

Petitioner,

v.

MICHAEL B. MUKASEY, Attorney General,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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January 16, 2009

QUESTIONS PRESENTED

1. Whether an alien in a deportation proceeding is denied his Fifth Amendment right to due process when ineffective assistance of retained counsel prevents him from pursuing his statutorily authorized appeal from an order of removal resulting from denial of well-founded claims for asylum, withholding of removal, and relief under the Convention Against Torture.

2. Whether the Board of Immigration Appeals has jurisdiction to reopen proceedings for the purpose of providing a remedy for ineffective assistance of counsel where, following the Board's final decision, counsel neglected to file a petition for review in the Court of Appeals.

PARTIES TO THE PROCEEDING

The parties to the proceeding below were Joseph Afanwi and Michael B. Mukasey, Attorney General.

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PETITION FOR A WRIT OF CERTIORARI

Joseph Afanwi petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS AND JUDGMENTS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (Pet. App. 3a-22a) is reported at 526 F.3d 788 (4th Cir. 2008). The order of the court denying Petitioner's petition for rehearing and rehearing en banc (Pet. App. 1a-2a) is unreported.

The Board of Immigration Appeals ("BIA") decision affirming the denial of Petitioner's asylum claim (Pet. App. 27a-29a) was issued on November 29, 2005, its order denying Petitioner's motion to reissue its decision (Pet. App. 26a) was issued on February 13, 2006, and its order denying Petitioner's motion to reopen immigration proceedings (Pet. App. 23a-25a) was issued on May 12, 2006. All three are unreported.

The decision of Immigration Judge Jill H. Dufresne denying Petitioner's application for asylum, withholding of removal, and relief under the Convention Against Torture ("CAT") (Pet. App. 30a-71a) was issued on July 22, 2004, and is unreported.

JURISDICTIONAL STATEMENT

The order of the United States Court of Appeals for the Fourth Circuit denying Petitioner's petition for rehearing and rehearing *en banc* (Pet. App. 1a-2a) was issued on August 19, 2008. On October 27, 2008, the Chief Justice extended the time to file this petition to January 16, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

This case primarily involves the Due Process Clause of the Fifth Amendment, which provides that "[n]o person shall ... be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

In addition, the principal statutory provisions involved are 8 U.S.C. §§ 1101(a)(42), 1158(b)(1)(A), 1231(b)(3)(A), and 1252. The relevant regulations are 8 C.F.R. §§ 1003.1, 1003.2, and 1208.16. These statutes and regulations are set out in the Appendix to this petition. (Pet. App. 72a-81a.)

STATEMENT

The courts of appeals are divided 7-2 over whether an alien has a Fifth Amendment due process right to effective assistance of counsel, if retained, in deportation proceedings. The Attorney General has recently deepened the conflict by overturning twenty years of BIA precedent and siding with the minority view that aliens lack such a right. Nevertheless, the Attorney General has conceded the importance both of national uniformity on this issue and of providing some remedy for ineffective assistance of counsel in deportation proceedings in egregious circumstances. Moreover, the Attorney General's acknowledgement of the critical importance of effective assistance of counsel contravenes his and the court below's erroneous and formalistic conclusion that there is no Fifth Amendment right to effective assistance because retained counsel is not a "state actor." This Court's intervention is necessary to resolve this deep conflict on an issue of paramount importance.

A. Background

The Immigration and Nationality Act authorizes the Attorney General to grant an alien asylum if the alien cannot return to another country because of "persecution or a well-founded fear of persecution on account of ... political opinion." 8 U.S.C. §§ 1101(a)(42)(A), 1158(b)(1)(A). While a grant of asylum is discretionary, withholding of removal is mandatory if "the alien's life or freedom would be threatened in that country because of the alien's ... political opinion." 8 U.S.C. § 1231(b)(3)(A).

An alien may also seek relief under the CAT if the alien can demonstrate that "more likely than not he or she would be tortured" if returned to the country of origin. 8 C.F.R. § 1208.16(c)(2). Like withholding of removal, CAT relief is not discretionary, but rather "*shall* be granted if the applicant's eligibility for withholding is established." *Id.* § 1208.16(d)(1) (emphasis added).

"'It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings.'" *Demore v. Hyung Joon Kim*, 538 U.S. 510, 523 (2003) (quoting *Reno v. Flores*, 507 U.S. 292, 306 (1993)). Further, Congress has expressly provided that all aliens facing removal proceedings "shall have the privilege of being represented (at no expense to the Government) by such counsel ... as he shall choose." 8 U.S.C. § 1362. It has also provided that hearings must be scheduled such "that an alien be permitted the opportunity to secure counsel before the first hearing date," *id.* § 1229(b)(1), and that "[t]he Attorney General shall provide for lists ... of persons who have indicated their availability to

represent pro bono aliens [in removal proceedings]," *id.* § 1229(b)(2).

Pursuant to its regulations, BIA has jurisdiction to reopen removal proceedings to remedy ineffective assistance, for example, by issuing a new removal order with a "fresh" deadline for appellate review. *See In re Compean*, 24 I&N Dec. 710, 740-41 (A.G. 2009); 8 C.F.R. § 1003.2(a). Congress also has provided for "[j]udicial review of a final order of removal," including review of constitutional claims. 8 U.S.C. § 1252(a)(1). The petition for judicial review "must be filed not later than 30 days after the date of the final order of removal." *Id.* § 1252(b)(1).

B. Relevant Facts

Cameroon has been ruled by strongman Paul Biya since 1982. (Pet. App. 134a.) His Francophone regime has been criticized for its repression of Anglophone citizens, and for ruthlessly crushing perceived opposition. (*Id.* at 128a-129a.) Members of targeted groups, such as the Southern Cameroon National Council (SCNC), an Anglophone separatist group, are at risk of arrest, detention and torture at the hands of Biya's security forces. (*Id.*) Prison conditions are notoriously harsh; it is not uncommon for detainees to die in custody. (*Id.* at 134a.)

Joseph Afanwi presented evidence in his removal proceedings to show that he has been affiliated with the SCNC since its founding, and that he began participating in anti-government activities in 1990. He gave detailed testimony of many incidents of persecution, including numerous separate occasions on which he personally was either violently beaten or captured and tortured on account of his political activities and affiliations. (Pet. App. at 87a-90a, 93a-

97a.) For instance, in 1990, a Francophone police officer stopped Afanwi on his way home from church and beat him thoroughly with a rifle butt and baton. (*Id.* at 87a-88a.) Likewise, following a 1994 rally, three police officers followed Afanwi home, beat him severely, and warned him to stop organizing rallies. (*Id.* at 93a.) Two particularly brutal incidents occurred in the late 1990s. In 1997, Afanwi was imprisoned for six days during which he suffered several savage beatings; on the last day, Afanwi was beaten unconscious and woke up in the hospital with genital swelling so severe that he lost one of his testicles. (*Id.* at 95a-97a.) In 1999, Afanwi was again captured for several days on account of his political affiliations with the SCNC; he was beaten severely, denied food and water, and deprived of sleep. (*Id.* at 98a-100a.)

Victor T. Le Vine, an expert on political conditions in Cameroon, testified that Afanwi's testimony and detailed descriptions of detention conditions were "eminently credible." (Pet. App. at 127a-128a.) Two other experts with intimate knowledge of Cameroonian conditions agreed that Afanwi's testimony comported with their knowledge, and opined that they expected that he would very likely be tortured if returned. (*See id.* at 55a, 64a-65a.) Further, three expert witnesses, including a psychologist with expertise in diagnosing torture victims, gave unrebutted evidence consistent with Afanwi's descriptions of his torture and beatings. (*Id.* at 46a-53a, 63a-64a.)

Afanwi also provided documentary evidence corroborating the specific claims and incidents described in his testimony. This included, *inter alia*,

a statement from Beatrice Fon, Afanwi's mother, confirming that on "several occasions" Afanwi had "suffered serious injuries while in the custody of Cameroonian security forces" and describing "two particularly horrendous beatings" Afanwi had suffered at the hands of Cameroonian security forces. (*Id.* at 82a-84a.)

Following this 1999 arrest and detention, Afanwi went into hiding in a Presbyterian Mission. (Pet. App. at 100a-101a.) The Cameroonian police were looking for SCNC leaders, and in March 2002 left a summons for Afanwi at his mother's home. (*Id.* at 102a.) The Presbyterian church hiding Afanwi selected him to attend a conference in the United States, giving him the opportunity to escape Cameroon. (*Id.*) He arrived in Washington, DC on July 22, 2002 as a B-2 visitor with permission to remain in the United States until January 2003. (*Id.* at 102a-103a.) Even after his escape to the United States, Cameroonian officials continued to seek him for arrest. (*Id.* at 12a, 24a.) He filed his initial application for asylum, withholding of removal, and CAT relief *pro se* in December 2002, and filed a revised application in January 2003 after receiving pro bono legal representation. (*See id.* at 54a, 60a.)

C. The Proceedings Below

Mr. Afanwi's petition was heard by an asylum officer on January 23, 2003, who referred the case to Immigration Court in Baltimore, which had jurisdiction to adjudicate the application. *See* 8 C.F.R. §§ 1208.2, 1208.14; (Pet. App. 60a). A hearing was held, and on July 22, 2004, IJ Dufresne denied Afanwi all relief in light of her adverse credibility determination. (*Id.* at 61a-69a.) The IJ deemed the

affidavit of Afanwi's mother, Ms. Fon, describing in detail "two particularly horrendous beatings" that she had "personally treated," inconsistent with Afanwi's claim to have been beaten on several occasions. (*Id.* at 62a-63a.) The IJ also found it implausible that Afanwi's mother would sustain a beating rather than tell the police of her son's whereabouts, when he was "already safe in the United States." (*Id.* at 66a-67a.)

The IJ considered implausible Afanwi's claim to have left his hiding place in 1990 to attend church. (Pet. App. 63a.) She also considered implausible Afanwi's claim to have been both beaten and put to forced labor while in custody. (*Id.* at 66a.) Finally, she found it "highly implausible that Respondent would be able to run away after being repeatedly mistreated over the course of more than ten days. This simply makes no sense." (*Id.*) The IJ did not articulate any further basis for finding these claims implausible.

The IJ rejected a newspaper article Afanwi produced describing the arrest of the phonetically-identical "Joseph Afonui" because this is not how Afanwi spells his name. (Pet. App. 67a.)

Discussing Afanwi's witnesses generally, the IJ acknowledged that "the record is replete with affidavits submitted on Respondent's behalf," but concluded that "none sufficiently corroborates his claims of arrest and mistreatment." (Pet. App. 64a-65a.) She criticized the expert testimony supporting Afanwi's general claims about country conditions on the ground that none of them had firsthand knowledge of his experience (*id.*), and the testimony of those who had firsthand knowledge on the ground

that in various cases they neglected to mention every detail that Afanwi mentioned. (*Id.* at 65a.)

The IJ declined to accept Dr. Basch's conclusion that Afanwi "did suffer the torture and abuse that he claims." (Pet. App. 63a-64a.) Her reasoning was that Dr. Basch's first affidavit described "[t]he presence of one testis in the scrotum with evidence of surgery on the scrotum and groin" while his second noted "[t]he presence of one testis in the scrotum with evidence of trauma to the scrotum and groin." (*Id.*) She rejected the testimony of Dr. Shu that Afanwi had been "involved in repeated cases of assault" because Dr. Shu "does not speculate on how Respondent received his injuries." (*Id.* at 64a.)

The IJ's introductory summary of evidence devotes considerable attention to Dr. Cogar's testimony as an expert psychologist specializing in torture, and notes that this testimony corroborated Afanwi's testimony to a large extent, and that Dr. Cogar found Afanwi's testimony credible and his minor inconsistencies themselves consistent with his symptoms of post-traumatic stress disorder. (Pet. App. 46a-53a.) However, the IJ did not discuss the merits of this testimony in her evaluation of Afanwi's claims. (*See generally id.* at 61a-69a.)

The IJ therefore denied Afanwi's eligibility for asylum and withholding of removal, and denied Afanwi's CAT claim without any independent analysis, but rather "for the reasons cited above in the denial of asylum." (Pet. App. 68a-70a.)

Afanwi filed a timely appeal and brief with BIA through his prior pro bono counsel. (Pet. App. 5a.) On November 29, 2005, BIA issued its decision adopting the IJ's adverse credibility finding and

dismissing the appeal despite "agree[ing] with the respondent that the Immigration Judge engaged in some unwarranted speculation." (*Id.* at 27a-29a.)

BIA mailed its order to prior counsel at the street address of his multi-firm office building in Washington, DC, but without specifying the name of counsel's law firm. (Pet. App. 5a, 10a & n.14.) Prior counsel had moved to California in the meantime, and had left instructions to forward his mail. (*Id.* at 5a.) This mail was not forwarded, however, and prior counsel first received BIA's order eight days after the deadline to file a petition for review under 8 U.S.C. § 1252(b)(1). (*Id.*) Therefore, although Afanwi had relied upon his prior counsel's agreement to file a petition for judicial review if necessary, Afanwi was unable timely to appeal BIA's decision. (*Id.*) With Afanwi's consent, prior counsel filed a motion to rescind and reissue BIA's decision, relying on the incomplete address used by BIA, because it appeared to be the best way to facilitate a timely appeal for judicial review. (*Id.*) After BIA denied that motion on February 13, 2006 (on the ground that the mailing error was not attributable to BIA), prior counsel was replaced by Petitioner's current counsel. (*Id.* at 5a, 26a.)

On February 27, 2006, Afanwi timely filed a motion to reopen proceedings with BIA, introducing new evidence that in December 2005, police confronted and interrogated Afanwi's family members regarding his whereabouts. (Pet. App. 141a-144a.) The motion also asserted that ineffective assistance of counsel had prevented him from timely filing a petition for judicial review. (*Id.* at 5a-6a.) BIA denied the motion to reopen, claiming that it

lacked jurisdiction to reopen because the claimed error related to the filing of a petition for review, which occurred after the Board's final decision. (*Id.* at 5a, 23a-25a.)

Also on February 27, 2006, ninety days after BIA's initial decision, Petitioner filed in the Fourth Circuit a petition for review of the IJ and BIA decisions. (Pet. App. 6a.) On March 8, 2006, Afanwi filed a second petition, captioned as a "corrected" petition for review, to seek review of BIA's denial of the motion to reissue. (*Id.*) On June 8, 2006, Afanwi filed a third petition, captioned as an "amended petition for review," to include BIA's denial of the motion to reopen. (*Id.*)

After supplemental briefing on the effective assistance of counsel issue, the Fourth Circuit denied Afanwi's petition for review. It denied review of Afanwi's merits claim, because the petition was not filed within thirty days after BIA's decision, as required by 8 U.S.C § 1252(b)(1). (Pet. App. 9a-10a.) It also found that even if BIA had used a correct address when mailing its decision, prior counsel still would have missed the deadline for filing the petition for review. (*Id.* at 10a.) The court next held that BIA lacked jurisdiction to reopen the proceedings to remedy an error which occurred at the petition-for-review stage, thus foreclosing any administrative remedy for the ineffective assistance. (*Id.* at 13a-15a.) The court then acknowledged Afanwi's Fifth Amendment right to due process in his removal proceedings, and noted also that a number of courts of appeals have found a Fifth Amendment violation where counsel's deficient performance affects the fundamental fairness of the proceeding. (*Id.* at 15a-

18a.) The court declined to join those circuits, however, holding instead that "retained counsel's ineffectiveness in a removal proceeding cannot deprive an alien of his Fifth Amendment right to a fundamentally fair hearing." (*Id.* at 18a.) The court explained that "Afanwi's counsel was not a state actor, nor is there a sufficient nexus between the federal government and counsel's ineffectiveness such that the latter may fairly be treated as governmental action." (*Id.* at 20a.)

REASONS FOR GRANTING THE WRIT

I. THE CIRCUITS ARE SHARPLY DIVIDED OVER WHETHER INEFFECTIVE ASSISTANCE OF COUNSEL TO A PERSON IN A REMOVAL PROCEEDING MAY, UPON A SHOWING OF SUFFICIENT PREJUDICE, CONSTITUTE A VIOLATION OF DUE PROCESS FOR WHICH A REMEDY IS CONSTITUTIONALLY REQUIRED

It is well-established that persons being subjected to possible deportation are entitled to the protections of the Due Process Clause. *See Demore*, 538 U.S. at 523. The precise parameters of the process that is thus constitutionally required is somewhat less clear and one area of sharp disagreement among the circuits concerns the availability of a remedy for ineffective assistance of counsel that results in denial of a fundamentally fair proceeding.

Seven courts of appeals – the First, Second, Third, Sixth, Ninth, Tenth and Eleventh Circuits – have expressly recognized that constitutional due process may be violated where the performance of retained counsel is ineffective in the context of a removal proceeding and prejudice is shown to result. This

conclusion is based on the rationale that while the Sixth Amendment's right to appointed counsel does not apply in a civil proceeding, the Fifth Amendment Due Process Clause is plainly applicable and may be violated when a retained lawyer's ineffective performance deprives the removal process of fundamental fairness. *See Lozada v. INS*, 857 F.2d 10, 13 (1st Cir. 1988) ("[i]neffective assistance of counsel in a deportation proceeding is a denial of due process" where the proceeding was "fundamentally unfair") (citation and internal quotation marks omitted); *United States v. Perez*, 330 F.3d 97, 101 (2d Cir. 2003) (same); *Fadiga v. Att'y Gen.*, 488 F.3d 142, 155 (3d Cir. 2007) (same); *Huicochea-Gomez v. INS*, 237 F.3d 696, 699 (6th Cir. 2001) (same); *Ray v. Gonzales*, 439 F.3d 582, 587 (9th Cir. 2006) (same); *Osei v. INS*, 305 F.3d 1205, 1208 (10th Cir. 2002) (same); *Dakane v. U.S. Att'y Gen.*, 399 F.3d 1269, 1273 (11th Cir. 2005) (same).

Several of these circuits have also acknowledged a due process right to a remedy for ineffective assistance where counsel's ineffectiveness occurs during the petition-for-review phase of a removal proceeding. *Dearinger ex rel. Volkova v. Reno*, 232 F.3d 1042, 1045 (9th Cir. 2000) ("where an alien is prevented from filing an appeal in an immigration proceeding due to counsel's error, the error deprives the alien of the appellate proceeding entirely" and prejudice is presumed because "the adversary process itself has been rendered presumptively unreliable") (citation and internal quotation marks omitted); *Sako v. Gonzales*, 434 F.3d 857, 864 (6th Cir. 2006) ("the fact that counsel failed to petition for judicial review of the findings of the BIA ... result[s] in a denial of due process... [if the alien] would have been entitled

to continue residing in the United States"); *Perez*, 330 F.3d at 101 ("[d]eprivation of the opportunity for judicial review can be established by demonstrating ineffective assistance of counsel"); *Chmakov v. Blackman*, 266 F.3d 210, 216 (3d Cir. 2001) (recognizing that "habeas might be available...if a due process violation frustrated...deportee's right of direct appeal" where counsel filed neither brief with BIA nor appeal to Third Circuit, thereby rendering the proceedings fundamentally unfair) (citation and internal quotation marks omitted).

By contrast, two courts of appeals, first the Fourth Circuit in the present case, and more recently the Eighth Circuit, have categorically ruled that the Due Process Clause, while applicable in the context of a removal proceeding, does not provide any remedy where counsel's ineffectiveness renders the proceeding fundamentally unfair. (Pet. App. 18a); *Rafiyev v. Mukasey*, 536 F.3d 853, 861 (8th Cir. 2008) (holding "there is no constitutional right under the Fifth Amendment to effective assistance of counsel in a removal proceeding").[1] And last week, the outgoing Attorney General, relying largely on these cases, concluded that "there is no constitutional right to effective assistance of counsel in [removal] proceedings," *In re Compean*, 24 I&N Dec. 710, 726

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[1] The Seventh Circuit has issued conflicting decisions on the matter. *See, e.g., Castaneda-Suarez v. INS*, 993 F.2d 142, 144 (7th Cir. 1993) (recognizing due process right); *Magala v. Gonzales*, 434 F.3d 523, 525 (7th Cir. 2005) (denying due process right); *Sanchez v. Keisler*, 505 F.3d 641, 647 (7th Cir. 2007) (finding that effective assistance right in removal proceedings is "derived ... ultimately [from] the Fifth Amendment's due process clause").

(A.G. 2009), and directed BIA and IJs to apply his decision "even in circuits that have previously held that there is a constitutional right to effective assistance of counsel." *Id.* at 730 n.8.

The ruling of the court below went further, however, also holding that "the BIA does not have jurisdiction over an ineffective assistance claim arising out of an alien's counsel's failure to file a timely petition for review with the court of appeals." (Pet. App. 14a-15a.) This has the effect of cutting off persons in the Fourth Circuit from even the limited administrative right to effective assistance that BIA has provided in some form since 1988. *See Compean*, 24 I&N Dec. at 731. Thus, the decision below conflicts with the other courts of appeals to consider the issue, and with the Attorney General's own interpretation of BIA's jurisdiction. *See Jin Bo Zhao v. INS*, 452 F.3d 154, 157-60 & n.5 (2d Cir. 2006) (recognizing BIA authority to reopen and reissue decision to remedy attorney's failure to file petition for review); *Sako*, 434 F.3d at 863 (stating that where attorney failed to petition for review, "successful motion to reopen due to ineffective assistance of counsel" was possible if party complied with administrative requirements and showed prejudice); *Dearinger*, 232 F.3d at 1044 n.4 ("A claim of ineffective assistance of counsel occurring after the BIA has ruled may be raised with the BIA by filing a motion to reopen."); *Compean*, 24 I&N Dec. at 740 ("the Board has jurisdiction to consider deficient performance claims even where they are predicated on lawyer conduct that occurred after a final order of removal has been entered").

II. THE ISSUES PRESENTED ARE OF GREAT AND RECURRING IMPORTANCE

In FY 2007, the immigration courts heard over 270,000 removal cases, of which over 15,000 included a defensive assertion of asylum eligibility. U.S. Dep't of Justice, Executive Office for Immigration Review, FY 2007 Statistical Year Book C3, I1 (2008), *available at* http://www.usdoj.gov/eoir/statspub/fy07syb.pdf. At the same time, BIA heard over 30,000 appeals from IJ case decisions. *Id.* at T2. Approximately 42% of cases before the immigration courts and 75% of BIA appeals were argued by attorneys. *Id.* at A1-A2. The sheer volume of such litigation makes it a matter of the utmost importance that this Court define the due process rights of persons subject to removal with clarity so they are not subject to varying interpretations from one circuit to another—a point which the Respondent has conceded. *Compean*, 24 I&N Dec. at 730 n.8 (stressing "interest of national uniformity" with respect to such rights).

The rights at issue in deportation proceedings are also of the utmost importance. This Court has compared deportation to "banishment" and "exile." *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948); *INS v. Errico*, 385 U.S. 214, 225 (1966). In upholding a alien's due process rights in deportation proceedings, this Court commented on the profound consequences of deportation, observing:

> Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That

> deportation is a penalty—at times a most serious one—cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness.

Bridges v. Wixon, 326 U.S. 135, 154 (1945). These observations are particularly apt where, as here, the defenses to deportation include claims for asylum, withholding of removal, and protection under the CAT. Deportation in such cases can be equivalent to a sentence of imprisonment, torture, or death. The seriousness of deportation adds to the importance of clearly defining and uniformly applying the due process rights of people facing this grave consequence. Indeed, the Attorney General conceded that "the stakes in removal proceedings are sometimes high, the immigration laws can be complex, and many aliens would be better equipped to navigate them with counsel" and that "regrettably, the deficiencies of the immigration bar are well known." *Compean*, 24 I&N Dec. at 728 (alteration, citation, and internal quotation marks omitted).

Adding to the importance of the issue is that as grave as the consequences of an adverse immigration judgment can be, the current adjudicatory system struggles to ensure even basic fairness. Judge Richard Posner of the Seventh Circuit recently described the process of immigration adjudication as "clearly inadequate," and complained that BIA "does not have the resources to give more than a perfunctory review" of IJ decisions. Lynne Marek, *Posner Blasts Immigration Courts as 'Inadequate' and Ill-Trained*, Nat'l L.J. (web ed.), Apr. 22, 2008,

http://www.law.com/jsp/article.jsp?id=1208861007986 (last visited Jan. 16, 2009). Statistical studies reveal systematic arbitrariness in the decisions of immigration judges, exploding numbers of appeals to the federal circuit courts, and serious disparities in results for similarly situated persons. Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 Stan. L. Rev. 295 (2007).

In light of these problems, this Court should resolve the issue whether a due process remedy exists for ineffective assistance of counsel in removal proceedings, and the extent of BIA's authority to alternatively provide for such a right vis-à-vis petitions for review, in order to ensure uniformity in the application of this right and bring a modest amount of order to this critical process.

III. PETITIONER'S RIGHT TO DUE PROCESS WAS DENIED BY THE DEPRIVATION OF EFFECTIVE ASSISTANCE OF COUNSEL

A. Due Process Requires A Remedy For Ineffective Assistance Of Counsel Resulting In Prejudice To Persons Seeking Asylum, Withholding Of Removal, And CAT Relief

"'It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings.'" *Demore*, 538 U.S. at 523 (quoting *Reno*, 507 U.S. at 306). This is hardly surprising given what is at stake: though technically not criminal, it is the equivalent of "banishment" or "exile," *Fong Haw Tan*, 333 U.S. at 10, and that "deportation is a penalty—at times a most serious one—cannot be doubted." *Bridges*, 326 U.S. at 154. Where a person seeks to avoid deportation by asylum, withholding of removal, or CAT relief, the fairness

and reliability of the procedures may actually determine whether he will ultimately be tortured or killed should he be deported. Thus, due process in the removal context requires "all opportunity to be heard upon the questions involving his right to be and remain in the United States." *Yamataya v. Fisher*, 189 U.S. 86, 101 (1903).

1. This Court's Ineffective Assistance Doctrine Is Rooted In The Due Process Clause

The Due Process Clause's guarantee of effective assistance of counsel is deeply rooted in American law and operates independent of the Sixth Amendment's guarantee of counsel. *See Martinez v. Court of Appeal*, 528 U.S. 152, 161 (2000) (Sixth Amendment inapplicable on appeals); *Evitts v. Lucey*, 469 U.S. 387, 396 (1985) (due process requires effective assistance on direct criminal appeal); *Strickland v. Washington*, 466 U.S. 668, 684-85 (1984) ("[t]he Constitution guarantees a fair trial through the Due Process Clauses"). Where the constitution requires such a right, there is "no basis for drawing a distinction between retained and appointed counsel that would deny equal justice to defendants who must choose their own lawyers." *Cuyler v. Sullivan*, 446 U.S. 335, 344-45 (1980).

This is so because in cases where the state seeks to deprive a party of liberty, the effective assistance of an attorney "whether retained or appointed ... plays the role necessary to ensure that the trial is fair." *Strickland*, 466 U.S. at 685. And when counsel is prejudicially ineffective, the entire conduct of the state's adverse proceeding is tainted, such that "*it is the State* that unconstitutionally deprives the defendant of his liberty," even as to "defendants who

must choose their own lawyers." *Cuyler*, 446 U.S. at 343, 345 (emphasis added).

Moreover, such a due process right extends to appellate review. In *Evitts*, the Court held that while the state need not create a process of appellate review, once it does so the statutory right to appeal functions "as an integral part of the ... system for finally adjudicating the guilt or innocence of a defendant," and "the procedures used in deciding appeals must comport with the demands of the Due Process ... Clause[] of the Constitution." 469 U.S. at 393 (citation and internal quotation marks omitted). As such, counsel's failure to file a required "statement of appeal," denied the defendant any opportunity for appellate review, and thus worked a denial of due process. *Id.* at 389, 396.

While those cases arose out of the deprivation of liberty attendant to a criminal trial and direct appeal, it has long been settled that the Due Process Clause also guarantees the "essential fairness of the state-ordered proceedings anterior to adverse state action" in nominally "civil" cases which are nonetheless "barely distinguishable from criminal condemnation in view of the magnitude and permanence of the loss [the affected party] faces." *M.L.B. v. S.L.J.*, 519 U.S. 102, 119-20 (1996). It is also settled that in certain serious, non-criminal proceedings, the Fifth Amendment's Due Process Clause requires that individuals be entitled to effective assistance, and thus the availability of a remedy when it is denied. *See, e.g., In re Gault*, 387 U.S. 1, 30-31 (1967) (holding that an adjudication of delinquency in non-criminal juvenile "'without effective assistance of counsel'" is inconsistent with

due process) (quoting and "reiterat[ing]" holding of *Kent v. United States*, 383 U.S. 541, 554 (1966)); *Vitek v. Jones*, 445 U.S. 480, 497 (1980) (noting that five Justices agreed that party entitled to "competent" assistance of trained professional at involuntary commitment hearing).

This Court has recognized that the practical consequences of an erroneous deportation can be comparable to the consequences of a criminal conviction. It follows that if an alien retains counsel, and that counsel prejudicially taints the removal proceedings with ineffective assistance, the *Government* violates due process by relying on those proceedings in order to deprive an alien of his liberty. *Cf. Cuyler*, 446 U.S. at 343; *Strickland*, 466 U.S. at 685; *M.L.B.*, 519 U.S. at 120. And on that point, there is no justification that could explain how the Due Process Clause could *forbid* the Government from depriving a person's liberty in prejudicially tainted, state-ordered criminal proceedings, but that the same clause would *allow* the Government to deprive a person's liberty, and send him to likely persecution or torture, in similarly tainted state-ordered removal proceedings.

Moreover, the right to effective assistance plainly extends to the petition-for-review stage, as judicial review is "an integral part of the ... system for finally adjudicating" the question of deportability. *See Evitts*, 469 U.S. at 393 (citation and internal quotation marks omitted). Judicial review of final orders of removal provided by 8 U.S.C. § 1252(b)(2) ensures that "petitioner's due process rights are not violated," *see Georgis v. Ashcroft*, 328 F.3d 962, 967 (7th Cir. 2003), and assures the alien that "[i]f the

BIA's practices result in a decision that allows a non-harmless error to slip through, there is always the avenue of an appeal to the courts to correct the error." *See Blanco de Belbruno v. Ashcroft*, 362 F.3d 272, 281 (4th Cir. 2004). Judicial review of removal decisions thus serves the same error-correcting function that this Court found critical in extending the right to effective assistance of counsel to the appellate stage in *Evitts*.

2. This Court's Precedents Prescribe A Due Process Based Remedy For Ineffective Assistance Of Immigration Counsel

This Court's governing test for due process remedies set forth in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)—which examines the private interest implicated by a government action, the risk of an erroneous deprivation of that interest absent the procedural safeguards in question, and the Government's interest or burden in avoiding such safeguards—confirms that an alien should have a remedy for prejudicial ineffective assistance of counsel in deportation proceedings involving asylum, withholding of removal, and CAT claims. The importance of retained counsel to the deportation process coupled with the risks of an erroneous deprivation caused by prejudicial ineffective assistance, shows that due process forbids the Government from deporting a party through a removal proceeding tainted by such ineffectiveness.

Private interest. *First*, the alien's "private interest that will be affected by the official action" here, the deportation, are of the highest order. *See Eldridge*, 424 U.S. at 335. It is the equivalent of banishment or exile, *Fong Haw Tan*, 333 U.S. at 10,

often for a person who has resided in the United States for an extended period and has family and friends there. Where the alien defends on the grounds of a well-founded fear of persecution, torture or death, a great deal more than that may be at stake.

Risk of deprivation. *Second,* the "risk of an erroneous deprivation of such interest" without any safeguards against ineffective assistance is high, as is the "probable value" of the additional safeguard of an effective assistance right, both at the hearing and appellate level. *Eldridge*, 424 U.S. at 335. Immigration law is "a notoriously complex and constantly shifting area of law." *Zhang v. United States*, 506 F.3d 162, 169 (2d Cir. 2007); *see also, e.g., INS v. Nat'l Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 195 (1991) (recognizing the "complex regime of immigration law"). As one court recently put it, "it is difficult to imagine a layman more lacking in skill or more in need of the guiding hand of counsel, than an alien who often possesses the most minimal of educations and must frequently be heard not in the alien's own voice and native tongue, but rather through an interpreter." *Hernandez-Gil v. Gonzales*, 476 F.3d 803, 807 (9th Cir. 2007). And, indeed, a widely-reported statistical analysis of recent asylum decisions shows that unrepresented asylum seekers before an immigration court were successful only 16.3% of the time, while represented aliens as a whole had a 45.6% success rate, with higher success rates for what the authors considered "quality" representation (such as that provided by Georgetown Law School's asylum clinic and large law firm pro bono programs). Ramji-Nogales et al., *supra*, at 340-41.

Moreover, Congress has ratified the critical role of counsel in deportation proceedings by codifying the due process right of aliens to retain counsel and be represented throughout the deportation proceedings. *See* 8 U.S.C. § 1362. Congress likewise requires that the Government affirmatively provide aliens facing deportation with notice of their right to counsel, a "current list" of pro bono attorneys, and time to obtain counsel. 8 U.S.C. § 1229(a)(1)(E)(ii), (b)(1)-(2). There can be little doubt that effective assistance of retained counsel is of the utmost importance to the aliens facing such proceedings, and that prejudicially ineffective counsel creates a high risk of an erroneous deportation.

Effective assistance of counsel at the federal appellate review stage likewise provides a significant safeguard against erroneous deprivations of liberty. The problems of the immigration courts, have been well-documented. *See, e.g.*, *Benslimane v. Gonzales*, 430 F.3d 828, 830 (7th Cir. 2005) (Posner, J.) (finding that the "adjudication of [immigration] cases at the administrative level has fallen below the minimum standards of legal justice"); *N'Diom v. Gonzales*. 442 F.3d 494, 500 (6th Cir. 2006) (Martin, J., concurring) (noting in the immigration context the "significantly increasing rate at which adjudication lacking reason, logic, and effort" appears in the federal courts); Adam Liptak, *Courts Criticize Judges' Handling of Asylum Cases*, N.Y. Times, Dec. 26, 2005, at A1; Ramji-Nogales et al., *supra*, at 373 (noting "dramatic" inconsistency among adjudication of asylum cases at the IJ level).

Additionally, BIA's procedural "streamlining" of 2002—including the elimination of three-judge

review panels in most instances in favor of single-member summary affirmance without opinion—has led to a marked decrease in the rate at which BIA has found errors in IJ reasoning. Ramji-Nogales et al., *supra*, at 355, 377. This has led to a widespread perception that BIA's review procedures have become less fair and effective, and resulted in a significant increase in federal court review. *See, e.g., id.*; *Berishaj v. Ashcroft*, 378 F.3d 314, 331 (3d Cir. 2004) stating that "the natural ... consequence of the streamlining regulations is summary affirmance by the BIA of stale, backlogged decisions by IJs. When it does so, the BIA may have shirked its role and duty of ensuring that the final agency determination in an immigration case is reasonably sound"); Pamela A. MacLean, *Immigration Bench Plagued By Flaws*, Nat'l L. J., Feb. 6, 2006, at 1 ("[w]hen the BIA had a more active role, it would clean up decisions .... Now [it] is a rubber stamp" (quoting former BIA Judge Lory Rosenberg)); *id.* ("[t]he BIA was effectively neutered by streamlining" (quoting Ninth Circuit Judge Michael Daly Hawkins)).

Noting such concerns, appellate courts have held that any such unfairness caused by BIA's truncated review procedures is mitigated by the federal courts' own role in review and error-correction of IJ and BIA decisions. *See, e.g., Zhang v. U.S. Dep't of Justice*, 362 F.3d 155, 158 (2d Cir. 2004) ("Our conclusion that streamlining does not violate due process is ... supported by the fact that the challenged procedures are followed by further appellate process, namely, judicial review"); *Falcon Carriche v. Ashcroft*, 350 F.3d 845, 851 (9th Cir. 2003) (same); *Georgis*, 328 F.3d at 967 (same); *Blanco de Belbruno*, 362 F.3d at 281 (same). Given that federal courts often provide

the only fora where an asylum or CAT claimant can be assured of thorough and fair appellate-level review, the effective assistance of retained immigration counsel at that level is critical.

Weak Government interest. *Third*, under these circumstances, the "fiscal and administrative burdens" of affording a remedy for prejudicial ineffective assistance of counsel should be given little if any weight, because it is counterbalanced by the Government's weighty interest in the sound implementation of its laws. *See Eldridge*, 424 U.S. at 335. The sovereign decisions to create fair procedures for asylum and withholding of removal, and the national decision to become a signatory to the CAT reflect judgments that, where the tests set forth are met, an alien should not be subjected to persecution or torture. Where the ineffective assistance of counsel results in substantial prejudice, including the likelihood of an incorrect decision, the importance of correcting that error outweighs any marginal interest in cost savings that might accrue from deportations "earned" not on the merits, but from attorney error.

Indeed, the Attorney General has conceded that "[t]here is a strong public interest in ensuring that th[e] deficiencies [of ineffective assistance of counsel] do not affirmatively undermine the fairness and accuracy of removal proceedings." *Compean*, 24 I&N Dec. at 728.

Accordingly, under this Court's governing criteria, due process requires a remedy for ineffective assistance in the context of a deportation proceeding.

3. The Rationale For Rejecting A Due Process Right Advanced By The Fourth Circuit And Repeated By The Attorney General Is Fatally Flawed

The rationale for rejecting a due process right to effective assistance of counsel, advanced by the Fourth Circuit, and expanded upon by Respondent's *Compean* decision, rests on several fundamentally flawed premises.

First, both the Fourth Circuit and Respondent primarily rely on the theory that because retained counsel are not state actors, their errors are not attributable to the state and as such, cannot violate the Constitution. (Pet. App. 19a-21a); *Compean*, 24 I&N Dec. at 719-21. But as described *supra*, the right to effective assistance derives from the due process guarantee of fair proceedings. The state is not allowed to "win" a deprivation of liberty based on the prejudicial errors of counsel, and its reliance on such tainted proceedings is the "state action" that violates due process. *See supra* at Part III.A.1. Indeed, this Court has expressly held that even appointed counsel such as public defenders are not "state actors," *Georgia v. McCollum*, 505 U.S. 42, 53 (1992); *Polk County v. Dodson*, 454 U.S. 312, 318 (1981), yet the ineffectiveness of these non-state actors nonetheless works a constitutional violation.

Second, Respondent also rests his conclusion on *Wainwright v. Torna*, 455 U.S. 586 (1982) and *Coleman v. Thompson*, 501 U.S. 722 (1991), which found that attorney error could not be attributed to the state in discretionary appeals and collateral habeas review, respectively. *See Compean*, 24 I&N Dec. at 723. But neither case involves the

proceedings by which the state may *deprive* a person of his or her liberty in the first instance, and which therefore must be fair before such a deprivation is allowed. *Coleman* itself made this distinction, noting that the state is constitutionally responsible for "*obtaining* a criminal conviction through a procedure that fails to meet the standard of due process of law." 501 U.S. at 754 (emphasis added; internal citation and quotation marks omitted). An administrative hearing, followed by a right to judicial review under 8 U.S.C. § 1252, is the established process by which an alien's liberty interests may be deprived, and thus the rule of *Wainwright* and *Coleman* is inapplicable.

Third, despite admitting that "the stakes in removal proceedings are sometimes high, the immigration laws can be complex, and many aliens would be better equipped to navigate them with counsel," and conceding that the immigration bar's "deficiencies ... are well known," Respondent rejects a due-process right to effective assistance because the "implications" of his concessions "would arguably require ... Government-appointed counsel [] in removal proceedings." *Compean*, 24 I&N Dec. at 725, 728 (citation and internal quotation mark omitted). But the question of a right to appointed counsel is not presented here, nor does it necessarily follow that a general right to appointed counsel exists in removal proceedings, or would be required to find a due process remedy for ineffective assistance here.

Rather, the question here is whether, given the statutory and regulatory policy of encouraging and facilitating aliens in retaining counsel, the Constitution allows the Government to deport an alien to face likely persecution and torture when, but

for the failure of the attorney to file a petition for review, the final order of removal would have been vacated and reversed.

As shown below, Afanwi had a strong, substantial case that he was persecuted and tortured, and faces likely persecution or torture should be deported. Had he not been deprived of an opportunity for judicial review due to ineffective assistance of counsel, the IJ and BIA's fundamentally flawed denial of relief and final order of removal would have been vacated. Due process should forbid the Government from removing him as a result, not of the strength of his case, but because the attorney he retained provided ineffective assistance.

4. The Fourth Circuit's Additional Holding That BIA Lacks Jurisdiction To Provide Even A Limited Administrative Remedy Is Baseless

The Fourth Circuit' s erroneous rejection of a due process right to effective assistance in removal proceedings was compounded by its perfunctory, and wholly unsupportable, conclusion that BIA also lacked the jurisdiction to provide any remedy for ineffective assistance associated with the filing of a petition for review. (Pet. App. 13a-15a.)

The Fourth Circuit's analysis rested solely on its reading of 8 C.F.R. § 1003.1(d)(3)(ii), which as the Attorney General correctly observes, "addresses only the scope and standard of review by the Board" and "does not purport to restrict the Board's jurisdiction or to limit the Board's broad authority to reopen removal proceedings." *Compean*, 24 I&N Dec. at 740-41. Instead, the regulation addressing BIA's *jurisdiction* plainly permits reopening after a final

order is entered. 8 C.F.R. § 1003.2(a) ("The Board may at any time reopen or reconsider on its own motion any case in which it has rendered a decision."). As such, Respondent correctly noted that the Fourth Circuit erred in holding that BIA lacked jurisdiction to provide a remedy for an attorney's failure to file a petition for review. *Compean*, 24 I&N Dec. at 740-41.

B. Under Any Conceivable Standard of Prejudice, Petitioner Was Prejudiced By Counsel's Failure To File A Timely Appeal

To be worthy of a remedy, a lawyer's ineffective assistance must fall below an objective standard of reasonableness and result in prejudice, namely a reasonable probability that, "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. There is some disagreement among the courts that have recognized an ineffective assistance remedy in the immigration context, about the character of the prejudice that must be shown. *See, e.g., Zheng v. Gonzales*, 422 F.3d 98, 106 (3d Cir. 2005) (must show "the alien was prevented from reasonably presenting his case") (citation and internal quotation marks omitted); *Ortiz v. INS*, 179 F.3d 1148, 1153 (9th Cir. 1999) (must show "performance of counsel was so inadequate that it may have affected the outcome of the proceedings").

Whatever the standard, the prejudice requirement is satisfied on the present facts because Afanwi's appeal would have been successful for at least two independent reasons: (1) because the IJ erroneously failed to conduct a separate analysis of Afanwi's CAT claim; and (2) because the IJ's rationale for rejecting

Afanwi's well-documented and corroborated claims of past persecution and his fear of future persecution were based upon so-called "inconsistencies" that are not supported by the record and which no reasonable adjudicator could have relied. The denial of judicial review prevented correction of these errors.

1. The IJ Prejudicially Erred By Failing To Conduct An Independent Analysis Of Afanwi's CAT Claim

Afanwi was first prejudiced by his counsel's ineffectiveness because, had that appeal been filed, the Fourth Circuit would almost certainly have vacated and remanded the administrative decision. This is because, contrary to binding law, the IJ failed to undertake an independent analysis of Afanwi's CAT claim. Such claims are distinct from claims for asylum and withholding of removal, and cannot be resolved simply through a reliance on an adverse credibility finding with respect to the asylum claim. *See Lopez-Soto v. Ashcroft*, 383 F.3d 228, 239 (4th Cir. 2004); *Camara v. Ashcroft*, 378 F.3d 361, 371 (4th Cir. 2004) ("standard[s] for relief" are "different"); *see also, e.g., Taha v. Ashcroft*, 389 F.3d 800, 802 (9th Cir. 2004) ("an adverse credibility finding in the asylum context does not end the Convention inquiry"); *Mansour v. INS*, 230 F.3d 902, 908 (7th Cir. 2000) ("[w]e are not comfortable with allowing a negative credibility determination in the asylum context to wash over the torture claim").

In determining eligibility for CAT relief, the adjudicator must consider "all evidence relevant to the possibility of future torture," including "[e]vidence of gross, flagrant or mass violations of human rights within the country of removal" and

"[e]vidence of past torture inflicted upon the applicant. 8 C.F.R. § 208.16(c)(3). "[C]ountry conditions alone can play a decisive role in granting relief under the Convention." *Kamalthas v. INS*, 251 F.3d 1279, 1280 (9th Cir. 2001). Even if not conclusive, "proper attention to relevant country conditions might lend credence to [an applicant's] assertions of torture and cause the BIA to view them in a different light." *Taha*, 389 F.3d at 802 (citation and internal quotation marks omitted).

Pursuant to these standards, the Fourth Circuit has vacated and remanded at least two other decisions by IJ Dufresne, in which she likewise made an adverse credibility judgment yet failed to fully and independently evaluate the petitioners' CAT claims.

In *Camara v. Ashcroft*, 378 F.3d 361, 366 (4th Cir. 2004), a Guinean national was denied asylum, withholding of removal, and CAT relief. Although the Fourth Circuit declined to reverse the IJ's adverse credibility determination, it vacated and remanded on the ground that she did not apply the separate and distinct legal analysis required for a claim under CAT. *Id.* at 371-72. Rather, the IJ simply denied, in perfunctory fashion, the CAT claims "[f]or the aforementioned reasons" related to the denial of asylum and withholding of removal. *Id.* at 371. And given the strength of the testimony left unconsidered, the Fourth Circuit explained that "the IJ's adverse credibility determination was insufficient to support the legal conclusion that Camara was ineligible for relief under the CAT." *Id.* at 372.

Five months later, the Fourth Circuit again vacated and remanded following its consideration of a

petition seeking review of the IJ's denial of relief under the INA and the CAT. *See Curumi v. Ashcroft*, 119 F. App'x 468, 475 (4th Cir. 2005). As in *Camara*, the Fourth Circuit declined to reverse the IJ's adverse credibility determination, but vacated and remanded based on the IJ's failure to apply the separate and distinct legal analysis required for a claim under CAT to the substantial independent evidence that the IJ failed to consider. *Id.* at 473-75.

Just as in *Camara* and *Curumi*, the IJ here failed to make the required separate determination for withholding of removal under CAT but rather made only a perfunctory statement that Afanwi failed to meet his burden of proof "for the reasons cited above in the denial of asylum." (Pet. App. 70a.) This cannot be squared with *Camara*, which emphasized that "an adverse credibility determination cannot alone preclude protection under the CAT." 378 F.3d at 372.

Compounding that error, and contrary to *Camara* and *Curumi*, the IJ and BIA alike dismissed substantial objective evidence of Afanwi's past persecution, ignored State Department reports describing ongoing oppressive conditions and flagrant violations of human rights within Cameroon, and the likelihood that Afanwi faces *future* torture if he is returned to Cameroon. *See Camara*, 378 F.3d at 372; *In re G-A-*, 23 I&N Dec. 366, 368 (BIA 2002).

Accordingly, but for the ineffective assistance, the Fourth Circuit would have vacated BIA's decision and remanded for further review. The error was thus prejudicial.

2. The IJ's Adverse Credibility Finding Was Based On Non-Existent "Inconsistencies" In The Record

In addition to the IJ's failure to properly analyze Petitioner's CAT claim, Petitioner was prevented from raising meritorious arguments that the IJ's adverse credibility judgment was based on supposed "inconsistencies" in the record that were nothing of the sort, or else resorted to naked speculation.

For instance, the IJ discredited the statement of Petitioner's mother because she described a "first major beating" that occurred in April 1997, while Afanwi had described multiple beatings prior to April 1997. (Pet. App. 62a-63a.) But her statement actually *confirmed* that Afanwi had been beaten on "several occasions." (*Id.* at 82a.) The statement then recounted in detail "two particularly horrendous beatings" that she "remembered ... well" because she had treated her son's wounds afterward. (*Id.*) The "first major beating" she referred to in the statement was unambiguously the first of the two she "remembered ... well" and *not* the first that Afanwi had *ever* suffered. (*Id.*) There was no inconsistency.

Likewise, the IJ found that Petitioner was not credible because of "[s]ignificant discrepancies" between his first, *pro se* affidavit and his revised second affidavit, made with the help of counsel. (Pet. App. 62a.) However, the second affidavit did not contradict the first; rather, it simply contained additional information, and described some of the worst beatings with more specificity. (*Compare id.* at 85a-107a (counseled affidavit) *with id.* at 108a-123a (*pro se* affidavit).) This is unsurprising, considering

that Petitioner completed the second, more comprehensive affidavit with legal assistance.

The IJ also discounted otherwise undisputed evidence with generally nonsensical speculation, which even BIA noted was "unwarranted." (Pet. App. 28a.) For instance, the IJ found it "highly improbable" or "made no sense" that Afanwi attended church when he knew he might be in danger (*id.* at 63a), that he would evangelize while at risk of persecution, (*id.*), that he would be beaten and put to forced labor while in custody (*id.* at 65a-66a), that he could escape following his injuries (*id.* at 66a), or that his mother would suffer a beating rather than disclose her son's whereabouts to authorities (*id.* 66a-67a), none of which are remotely outside the human experience, let alone disputed by actual evidence in the record.

Finally, the IJ summarily dismissed, as "inconsistent," two medical reports by Dr. Peter Basch describing the loss of Petitioner's testicle. (Pet. App. 63a-64a.) The IJ's reasoning was that the first report said that there was "evidence of surgery on the scrotum and groin," while the second observed "evidence of trauma to the scrotum and groin," but that the doctor was supposedly not offered for cross-examination to "reconcile this inconsistency." (*Id.*) But Dr. Basch's second report does address the so-called "inconsistency"—namely, that "because of language difficulties" he misunderstood Afanwi's reference to "medical treatments" as meaning surgery, but that he corrected this misunderstanding after a follow-up examination and interview; it remained the case that his observations were at all time consistent with blunt force trauma to the groin.

(Pet. App. 124a-126a.) Moreover, the attorney for the Department of Homeland Security conceded that Dr. Basch was offered for cross-examination, but that DHS chose not to respond. (Pet. App. 139a-140a.)

Apart from these "inconsistencies," the IJ (1) improperly disregarded corroborating medical records from Cameroon; (2) did not address medical evidence that Afanwi had symptoms consistent with torture; (3) disregarded an undisputedly authentic police summons corroborating the persecution; (4) disregarded a newspaper article discussing Afanwi's persecution because it misspelled his name as the phonetically-identical "Afonui"; (5) disregarded affidavits of three professors with expertise on Cameroon that corroborated Afanwi's credibility; and (6) otherwise disregarded other testimony corroborating the details of Afanwi's affidavit. (*See* Pet. App. 54a-59a, 64a-65a, 67a.)

This record, taken as a whole, shows that the IJ's denial of relief was entirely unreasonable. Had Afanwi been able to seek review of that denial, the Fourth Circuit would have most likely vacated the IJ's flawed decision. The ineffective assistance of counsel that prevented such review was thus prejudicial.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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FILED: August 19, 2008

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 06-1236
(A96-269-753)

JOSEPH AFANWI

Petitioner

v.

MICHAEL B. MUKASEY, Attorney General

Respondent

AMERICAN IMMIGRATION LAW FOUNDATION; AMERICAN IMMIGRATION LAWYERS ASSOCIATION; CAPITAL AREA IMMIGRANTS' RIGHTS COALITION; NATIONAL IMMIGRANT JUSTICE CENTER,

Amici Supporting Petitioner

ORDER

Upon consideration of petitioner's motion to stay mandate and maintain stay of removal pending certiorari review, the Court denies the motion.

Entered at the direction of Judge Ellis with the concurrence of Chief Judge Williams and Judge Duncan.

For the Court

/s/ Patricia S. Connor, Clerk

JOSEPH AFANWI, Petitioner v. MICHAEL B. MUKASEY, Attorney General, Respondent

No. 06-1236

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

On Petition for Review of an Order of the Board of Immigration Appeals.
(A96-269-753)

Argued: September 25, 2007

Decided: May 19, 2008

Before WILLIAMS, Chief Judge, DUNCAN, Circuit Judge, and T.S. ELLIS, III, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

ELLIS, Senior District Judge:

In this immigration and asylum case, petitioner Joseph Afanwi, a citizen of Cameroon, seeks review of three Board of Immigration Appeals (BIA) orders: (i) a November 29, 2005 Order affirming an immigration judge's denial of Afanwi's asylum claim; (ii) a February 13, 2006 Order denying Afanwi's motion to rescind and reissue the November 29 Order; and (iii) a May 12, 2006 Order denying Afanwi's motion to reopen immigration proceedings. For the reasons that follow, the petition is denied.

I.

Afanwi, a citizen of Cameroon, entered the United States legally in July, 2002. As a non-immigrant visitor, Afanwi was authorized to remain in the United States only until January 23, 2003. On January 20, 2003, Afanwi filed, *pro se*, an application for asylum, withholding of removal, and protection under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).[1] Afanwi claimed that he was a member of the Social Democratic Front[2] and the Southern Cameroons National Council,[3] and that his membership and involvement in these groups made him a target of persecution in Cameroon.

Afanwi's application was referred to an immigration judge (IJ), and while the application was pending the Immigration and Naturalization Service (INS)[4] began removal proceedings by filing a Notice to Appear before the IJ. The INS alleged that Afanwi was removable pursuant to the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(1)(B), because he had remained in the United States longer than

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[1] Dec. 10, 1984, 1465 U.N.T.S. 85; S. Treaty Doc. No. 100-20 (1990).

[2] The Social Democratic Front is an opposition political party affiliated with the Socialist International.

[3] The Southern Cameroons National Council is a secessionist organization seeking 'decolonization' of the predominantly English-speaking south-western region of Cameroon.

[4] The INS was subsequently incorporated into the Department of Homeland Security. See Homeland Security Act of 2002, Pub.L. 107-296, 116 Stat. 2135 (codified as amended in scattered sections of 6 U.S.C.).

permitted. Afanwi resisted removal on the same grounds underlying his asylum, withholding of removal, and CAT application. The IJ issued a written opinion finding Afanwi's claims lacking in credibility and consequently denied his asylum, withholding of removal, and CAT claims. Afanwi's timely appeal to the BIA was unsuccessful; the BIA affirmed the IJ's decision and dismissed Afanwi's appeal on November 29, 2005.

The BIA sent a copy of its November 29, 2005 Order to Afanwi's attorney of record at the time,[5] but because the attorney had relocated to another office and did not check his mail until early January 2006, Afanwi's counsel did not learn of the BIA's Order until after the deadline for filing a petition for judicial review had passed. Afanwi was therefore unable to file a timely petition for review of the BIA's November 29, 2005 Order. Instead, Afanwi filed a motion to rescind and reissue the November 29, 2005 decision and Order to allow him to file a timely petition. In support of this motion, Afanwi argued that the BIA had used an incomplete address when it sent the November 29, 2005 Order to his attorney, which, he said, "could have delayed delivery" thereby preventing him from filing a timely appeal. On February 13, 2006 the BIA denied Afanwi's motion to rescind and reissue.

Afanwi then filed a motion to reopen his application on two grounds: (i) that new evidence relating to his asylum claim justified reopening his application, and (ii) that Afanwi had received ineffective assistance of counsel. This effort also failed. The BIA denied Afanwi's motion to reopen on

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[5] We note that Afanwi is now represented by different counsel.

May 12, 2006, finding (i) that the new evidence proffered by Afanwi failed to remedy the shortcomings of his original application, and (ii) that Afanwi's ineffective assistance claim was beyond the BIA's jurisdiction.

Following the BIA's denial of his motions, Afanwi filed this petition for review with this court on February 27, 2006, seeking review of the BIA's November 29, 2005 Order affirming the denial of his asylum, withholding of removal, and CAT claims. Afanwi "corrected"[6] this petition on March 8, 2006, to add a request for review of the BIA's February 13, 2006 Order denying his motion to rescind and reissue. Afanwi further "amended" the petition on June 8, 2006, to seek review of the BIA's May 12, 2006 Order denying his motion to reopen.[7] Respondent filed a motion to dismiss the petition on March 2, 2006, and Afanwi responded in opposition on March 16, arguing that his amended petition rendered respondent's motion moot. Following oral argument, the parties were instructed to file supplemental briefs addressing whether an alien has a Fifth Amendment right to effective assistance of counsel in the filing of a petition for review and, if so, whether the right extends to other aspects of the petition-for-review process. The parties have filed their supplemental briefs, and the appeal is now ripe for disposition.

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[6] Thus, the term "corrected petition" refers herein to Afanwi's March 8, 2006 petition for review.

[7] Thus, the term "amended petition" refers herein to Afanwi's June 8, 2006 petition for review.

II.

The Immigration and Naturalization Act (INA) vests courts of appeals with jurisdiction to review final orders of removal of an alien. 8 U.S.C. § 1252 (2005). An order of removal — formerly denominated an order of deportation[8] — is "the order of the special inquiry officer, or other such administrative officer to whom the Attorney General has delegated the responsibility for determining whether an alien is deportable, concluding that the alien is deportable or ordering deportation."[9] Such an order becomes final upon the earlier of "a determination by the Board of Immigration Appeals affirming such order" or "the expiration of the period in which the alien is permitted to seek review of such order by the Board of Immigration Appeals."[10] The INA further provides that a petition for review "must be filed not later than 30 days after the date of the final order of removal."[11] Because Afanwi seeks review of three separate orders — namely, (i) the November 29, 2005 Order affirming the immigration judge's denial of Afanwi's asylum, withholding of removal, and CAT claims, (ii) the February 12, 2006 Order denying Afanwi's motion to rescind and reissue, and (iii) the May 13, 2006 Order denying Afanwi's motion to reopen — we will consider each individually.

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[8] Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 309, Pub. L. No. 104-208, 110 Stat. 3009-546, at 3009-627 (1996); *see also Velasquez-Gabriel v. Crocetti*, 263 F.3d 102, 104 (4th Cir. 2001).

[9] 8 U.S.C. § 1101(a)(47)(A).

[10] 8 U.S.C. § 1101(a)(47)(B).

[11] 8 U.S.C. § 1252(b)(1).

Before doing so, however, we must address a threshold jurisdictional matter, namely whether Afanwi has correctly invoked this court's jurisdiction by filing procedurally proper petitions. Respondent argues that Afanwi's corrected and amended petitions are procedurally improper, and that we therefore lack jurisdiction to review the BIA's orders denying Afanwi's motion to rescind and reissue and motion to reopen. According to respondent, the Supreme Court in *Stone v. I.N.S.*, 514 U.S. 386 (1995), construed the INA to require separate petitions for (1) review of the original order of removal and (2) review of any subsequent motions for reconsideration. In other words, respondent claims that *Stone* required Afanwi to file a separate petition for review for each of the three orders in issue on this appeal.

This argument misreads *Stone*, for that decision, closely read, does not require that a petitioner must, in all circumstances, file a separate petition for review for each order. Instead, *Stone* stands for no more than the unremarkable proposition that a petitioner who files a motion for reconsideration of an order cannot wait for disposition of that motion before filing a petition for review of the order for which reconsideration is sought. In other words, *Stone* avoids delaying judicial review of an order that is pending reconsideration by requiring timely filing of a petition for review of that order notwithstanding that a motion for reconsideration remains unresolved. *Stone* further contemplates the filing of a separate petition once the motion for reconsideration is resolved and the subsequent consolidation of these petitions by the court of appeals. In the words of *Stone*, "deportation orders are to be reviewed in a

timely fashion after issuance, irrespective of the later filing of a motion to reopen or reconsider." 514 U.S. at 395.

Correctly read, therefore, *Stone* is no obstacle to our jurisdiction to consider Afanwi's petition. He was not required to file separate petitions for review of the BIA's February 13, 2006 Order denying his motion to rescind and reissue and the BIA's May 12, 2006 Order denying his motion to reopen. Petitioner's March 8, 2006 corrected petition and his June 8, 2006 amended petition suffice to bring these matters before us for review.[12] We therefore turn to a consideration of each of the BIA's decisions in turn.

III.

Afanwi first seeks review of the BIA's November 29, 2005 Order affirming the immigration judge's denial of his (1) asylum, (2) request for withholding of removal, and (3) CAT application. Afanwi concedes, as he must, that this petition is untimely, for the INA required him to file his petition not later than 30 days after the BIA's Order, that is, not later than December 29, 2005.[13] It is undisputed that the untimeliness of Afanwi's petition with respect to the November 29 Order is attributable to his attorney's failure to check his mailbox following his transfer to another office. As a result of this oversight, Afanwi and his counsel did not learn of the November 29, 2005 Order until after the expiration of the 30-day period allowed by the INA for filing of a petition for

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[12] It is undisputed that the corrected and amended petitions satisfy the requirements of Rule 15, Fed. R. App. P., and were timely filed.

[13] 8 U.S.C. § 1252(b)(1).

review. Specifically, Afanwi filed this petition on February 27, 2006, some sixty days after the BIA's November 29, 2005 Order and thirty days after the statutory deadline. Afanwi's petition is accordingly untimely with regard to the BIA's November 29, 2005 Order, and it must be denied in this respect.

IV.

Afanwi next seeks review of the BIA's February 13, 2006 Order denying Afanwi's motion to rescind and reissue the November 29 Order. We affirm the BIA's February 13 Order for two reasons.

First, Afanwi sought reissue of the November 29 Order on the ground that the BIA had used an incomplete address[14] that may have delayed delivery of the November 29 Order. There is no evidence that the incomplete address caused any delay in delivery of the Order. Afanwi has conceded that his attorney did not check his mailbox until well after the deadline for a timely petition for review had passed, and thus he cannot show that the incomplete address prevented his filing a timely petition for review; to the contrary, it is clear that had the BIA used a complete address Afanwi would still have missed the filing deadline owing to his attorney's failure to check his mail.[15]

Second, the BIA is not obligated to rescind and reissue its orders in circumstances such as these, as

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[14] Although the BIA employed a full municipal address and named Afanwi's attorney as the recipient, the address omitted the name of the attorney's law firm.

[15] It is also worth noting that the BIA had previously used this incomplete address to correspond with Afanwi's attorney without incident.

the decision to rescind and reissue when the BIA has committed no error is a matter of grace and discretion. Although this issue is one of first impression in this circuit, the Seventh Circuit has addressed the issue in a similar situation in *Firmansjah v. Ashcroft*.[16] There, the petitioning alien had not received the BIA's order of removal until after the deadline to file a petition for review had passed.[17] The Seventh Circuit concluded that while "nothing prevents the [BIA] from entering a new removal order, which is subject to a fresh petition for review,"[18] the court would "not say that the board *must* reenter its decision if notice miscarries; [rather,] when the [BIA] extends to aliens this measure of grace, there is no legal obstacle to judicial review."[19] We join the Seventh Circuit in holding that the decision to rescind and reissue an order of removal is properly left to the discretion of the BIA, and that where, as here, a petitioner fails to receive an order through no fault of the BIA, a court of appeals properly defers to the BIA's decision not to extend this measure of grace. Accordingly, Afanwi's petition for review is denied with respect to the BIA's February 13, 2006.

V.

Finally, Afanwi seeks review of the BIA's May 12, 2006 Order denying his motion to reopen his asylum, withholding of removal, and CAT application. The INA permits an alien to file a single motion to reopen

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[16] 347 F.3d 625 (7th Cir. 2003).

[17] *Id.* at 626.

[18] *Id.* at 627.

[19] *Id.*

removal proceedings.[20] A BIA decision denying the motion to reopen is reviewed for abuse of discretion,[21] and we will reverse such a decision only if it is arbitrary, capricious, or contrary to law.[22]

Afanwi asked the BIA to reopen his application on two grounds: (i) new evidence supporting his claim for asylum, and (ii) ineffective assistance of counsel. The BIA denied Afanwi's motion on each ground.

First, the BIA found that the new evidence did not support reopening Afanwi's application because it did not correct the application's existing deficiencies. We affirm the BIA's reasoned decision in this respect. To establish eligibility for asylum, Afanwi must demonstrate that he is a refugee, that is, a "person who is unable to return to his or her country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42)(A); *Rusu v. I.N.S.*, 296 F.3d 316, 324 (4th Cir. 2002). The new evidence presented in Afanwi's motion to reopen — namely, his allegation that Cameroon police visited Afanwi's home in that country looking for him — does not create a well-founded fear of persecution, and the BIA's decision to that effect cannot be said to be arbitrary, capricious, or contrary to law.[23] Accordingly, the BIA's denial of Afanwi's motion to reopen on this ground is affirmed.

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[20] 8 U.S.C. § 1229a(c)(7).

[21] *I.N.S. v. Doherty*, 502 U.S. 314, 323-24 (1995).

[22] *Barry v. Gonzales*, 445 F.3d 741, 744-45 (4th Cir. 2006).

[23] *See Barry*, 445 F.3d at 744-45.

Next, the BIA found that it lacked jurisdiction over Afanwi's ineffective assistance of counsel claim because the allegedly ineffective assistance, namely counsel's failure to file a timely petition for review of the Board's November 29, 2005 decision, occurred after the BIA had issued its final order of removal. The question, therefore, is whether the BIA has jurisdiction to consider an ineffective assistance of counsel claim when that claim arises, as here, from the failure to file a timely petition for review with the court of appeals. A review of the authority on this issue discloses no settled or uniform view. The courts of appeals have not squarely addressed the issue, although some, including the Fourth Circuit, have apparently assumed without deciding that the BIA does have jurisdiction over such ineffective assistance of counsel claims and have affirmed BIA decisions regarding such claims on the merits.[24] The BIA itself has issued contradictory opinions on the subject, at times holding, as it did here, that failure to file a timely petition for review is beyond the BIA's

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[24] *See Gidiglio v. I.N.S.*, 35 F.3d 556 (Table) (4th Cir. 1994) (unpublished) (affirming BIA's denial of alien's motion to reopen based on attorney's failure to file timely petition for review, on ground that alien had not demonstrated prejudice as required by *Matter of Lozada*, 19 I.& N. Dec. 637 (BIA 2003)); *see also Sako v. Gonzales*, 434 F.3d 857, 862-66 (6th Cir. 2006) (same); *Ljucovic v. Gonzales*, 144 Fed. Appx. 500 (6th Cir. 2005) (same). *But see Dearinger ex rel. Volkova v. Reno*, 232 F.3d 1042, 1044 n.4 (9th Cir. 2000) (asserting without explanation that "[a] claim of ineffective assistance of counsel occurring after the BIA has ruled may be raised with the BIA by filing a motion to reopen."). This confusion appears to arise from courts' reliance on cases involving an attorney's failure to appeal an IJ's decision to the BIA — a scenario in which the BIA clearly does enjoy jurisdiction. *See Matter of Lozada*, 19 I. & N Dec. 637.

jurisdiction,[25] and at times assuming that such a claim is properly within the BIA's jurisdiction.[26] Because the BIA denied Afanwi's motion to reopen on the grounds that it lacked jurisdiction over his ineffective assistance claim, the matter is squarely before us, and we take this opportunity to state clearly that the BIA does not have jurisdiction over an ineffective assistance claim arising out of an alien's counsel's failure to file a timely petition for review with the court of appeals.

The BIA has jurisdiction to review "questions of law, discretion, and judgment and all other issues in appeals from decisions of immigration judges."[27] An attorney's failure to monitor his mailbox for receipt of a BIA decision and to file a timely petition in the court of appeals for review of that decision is not a "question[ ] of law, discretion, [or] judgment [or] other

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[25] *See In re Juan Manuel Orozco-Solis*, 2006 WL 1558842 (BIA April 11, 2006) (ineffective assistance claim based on counsel's failure to inform alien of alien's appeal rights was beyond the BIA's jurisdiction); *In re Alva Mercedes Duarte-Garcia*, 2006 WL 729793 (BIA Feb. 14, 2006) (ineffective assistance claim based on counsel's failure to file for petition for review with court of appeals was beyond the BIA's jurisdiction); *In re Robert Michael St. George Grant*, 2005 WL 3952740 (BIA Aug. 25, 2005) (same), *In re Lourdes Sorinno-Vino*, 2003 WL 23508567 (BIA Dec. 23, 2003) (same).

[26] *See In re Nuradin Ahmed*, 2005 WL 1104347 (BIA Mar. 31, 2005) (counsel's filing of inadequate motion to reconsider with the BIA rather than timely petition for review with court of appeals constituted ineffective assistance); *see also In re Dean Maurice Morgan*, 2006 WL 1647462 (BIA May 9, 2006) (rejecting alien's ineffective assistance claim based on counsel's failure to inform alien of alien's appeal rights because alien had not presented the claim in an appropriate manner).

[27] 8 C.F.R. § 1003.1(d)(3)(ii).

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issue[ ] in appeal[ ] from decisions of immigration judges."[28] As the BIA itself has concisely put it, "any error before the [court of appeals] by [an alien's] counsel does not implicate the Board since the Board made no error as a result of [the alien's] counsel's alleged ineffectiveness on this ground."[29] Accordingly, we affirm the Board's denial of Afanwi's motion to reopen on the grounds of ineffective assistance of counsel and dismiss Afanwi's petition for review in this regard, since the alleged ineffective assistance, if any, occurred before this court, not before the Board of Immigration Appeals.

Yet this does not end our analysis, for the Immigration and Nationality Act vests the courts of appeals with jurisdiction over "all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States." 8 U.S.C. § 1252(b)(9) (2005). This section, known as the "zipper" clause, consolidates review of matters arising from removal proceedings "only in judicial review of a final order under this section," and strips courts of habeas jurisdiction over such matters. Because Afanwi's ineffective assistance claim is before the court pursuant to a timely petition for review of an order of removal — namely the BIA's denial of Afanwi's motion to reopen — jurisdiction over this claim is appropriate under § 1252(b)(9).

Afanwi's ineffective assistance claim requires us to address whether the Constitution guarantees

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[28] *Id.*

[29] *In re Duarte-Garcia*, 2006 WL 729793.

effective assistance of counsel to an alien in removal proceedings. It is well settled that removal proceedings are civil in nature, not criminal.[30] It is equally well settled that because removal proceedings are not criminal proceedings, aliens facing removal are not entitled to the Sixth Amendment's right to counsel, nor to the associated right to effective counsel.[31] Yet, aliens facing removal are not without rights; Congress, by statute, has created a right to *retained* counsel at removal proceedings,[32] and it is quite clear that aliens enjoy a Fifth Amendment right to due process in such proceedings.[33]

At issue is whether Afanwi's Fifth Amendment right to due process in his removal proceedings

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[30] *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984).

[31] *Romero v. U.S. INS*, 399 F.3d 109, 112 (2d Cir. 2005); *Al Khouri v. Ashcroft*, 362 F.3d 461, 464 (8th Cir. 2004). *Goonsuwan v. Ashcroft*, 252 F.3d 383, 385 n.2 (5th Cir. 2001). *Hernandez v. Reno*, 238 F.3d 50, 55 (1st Cir. 2001); *Xu Yong Lu v. Ashcroft*, 259 F.3d 127, 131 (3d Cir. 2001); *Mejia Rodriguez v. Reno*, 178 F.3d 1139, 1146 (11th Cir. 1999); *Mustata v. U.S. Dep't of Justice*, 179 F.3d 1017, 1022 n.6 (6th Cir. 1999); *Gandarillas-Zambrana v. Board of Immigration Appeals*, 44 F.3d 1251, 1256 (4th Cir. 1995); *Castaneda-Suarez v. INS*, 993 F.2d 142, 144 (7th Cir. 1993); *Michelson v. INS*, 897 F.2d 465, 467-68 (10th Cir. 1990); *Baires v. INS*, 856 F.2d 89, 90 (9th Cir. 1988).

[32] 8 U.S.C. § 1362 (1996) ("In any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose.").

[33] *Reno v. Flores*, 507 U.S. 292, 306 (1993) ("It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings.").

includes the right to a remedy for ineffectiveness of retained counsel. Since the 1970s, a number of circuits have held that counsel's performance in a removal proceeding can be so deficient that it deprives the alien of his due process right to a fair hearing.[34] Interestingly, this line of cases grows out of the Fifth Circuit's decision in *Paul v. I.N.S.*, which does not squarely recognize a right to effective assistance of retained counsel but merely suggests that such a right, if it existed, would be grounded in the Fifth Amendment rather than the Sixth.[35]

According to the *Paul* line of cases, an alien's counsel will violate his client's Fifth Amendment right when his performance is so deficient that it affects the fundamental fairness of the proceeding,[36] causing the alien to suffer prejudice as a result.[37] A

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[34] *See Uspango v. Ashcroft*, 289 F.3d 226, 231 (3d Cir. 2002); *Huicochea-Gomez v. INS*, 237 F.3d 696, 699 (6th Cir. 2001); *Akinwunmi v. INS*, 194 F.3d 1340, 1341 (10th Cir 1999); *Mejia Rodriguez v. Reno*, 178 F.3d 1139, 1146 (11th Cir. 1999); *Mojsilovic v. INS*, 156 F.3d 743, 748 (7th Cir. 1998); *Saleh v. U.S. Dep't of Justice*, 962 F.2d 234, 241 (2d Cir. 1992); *Lozada v. INS*, 857 F.2d 10, 13-14 (1st Cir. 1988); *Magallanes-Damian v. INS*, 783 F.2d 931, 933 (9th Cir. 1986).

[35] *Paul v. U.S. INS*, 521 F.2d 194 (5th Cir. 1975) ("[Any effective assistance of counsel] right an alien may have [in removal proceedings] is grounded in the fifth amendment guarantee of due process rather than the sixth amendment right to counsel," but "the existence, let alone the nature and scope, of such a right has not been established.").

[36] *Goonsuwan*, 252 F.3d at 385 n.2; *Huicochea-Gomez*, 237 F.3d at 699; *Iavorski v. U.S. INS*, 232 F.3d 124, 128-29 (2d Cir. 2000); *Mejia Rodriguez*, 178 F.3d at 1146; *Michelson v. INS*, 897 F.2d 465, 468 (10th Cir. 1990); *Magallanes-Damian*, 783 F.2d at 933.

[37] *Goonsuwan*, 252 F.3d at 385 n.2; *Michelson*, 897 F.2d at 468; *see also Sako v. Gonzales*, 434 F.3d 857 (6th Cir. 2006) ("The

number of courts have held that fundamental fairness is affected when an alien is prevented from reasonably presenting his case.[38]

Were we to follow these cases in holding that a retained counsel's ineffectiveness can deprive an alien of a fundamentally fair removal proceeding, we would next have to determine whether Afanwi's counsel's alleged ineffectiveness in failing to file a timely petition for review of the BIA's November 29, 2005 Order deprived Afanwi of an opportunity reasonably to present his case and whether that failure caused Afanwi prejudice. But we decline to engage in this analysis, because we hold today, contrary to some of our sister circuits, that retained counsel's ineffectiveness in a removal proceeding cannot deprive an alien of his Fifth Amendment right to a fundamentally fair hearing.

It is a basic principle of American constitutional law that with one exception,[39] the Constitution

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two components of this formulation, prejudice and fundamental fairness, are analogous in this specific analytical context. "Prejudice" inquires, ex post, whether due process was violated by evaluating whether the alien's claims could have supported a different outcome. "Fundamental fairness" examines the process afforded ex ante, considering whether the denial of effective counsel makes such a proceeding fundamentally unfair.").

[38] *Dakane v. U.S. Att'y General*, 399 F.3d 1269, 1273 (11th Cir. 2003); *Denko v. INS*, 351 F.3d 717, 723-24 (6th Cir. 2003); *Uspango*, 289 F.3d 226, 231; *Bernal-Vallejo v. INS*, 195 F.3d 56, 63-64 (1st Cir. 1999); *Lopez v. INS*, 775 F.2d 1015, 1017 (9th Cir. 1985)

[39] The only clause in the Constitution that directly regulates the conduct of private citizens is the Thirteenth Amendment, which "is not a mere prohibition of state laws establishing or upholding slavery, but an absolute declaration that slavery or

applies only to the federal government which it creates and, via the Fourteenth Amendment and certain other clauses, to the governments of the several states. The Supreme Court long ago held that the rights guaranteed by the Constitution "cannot be impaired by the wrongful acts of individuals, unsupported by state authority in the shape of laws, customs, or judicial or executive proceedings."[40] It follows that an alien's counsel cannot violate his client's Fifth Amendment rights unless he can be said to be engaging in state action.[41]

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involuntary servitude shall not exist in any part of the United States." *Civil Rights Cases*, 109 U.S. at 20; *see also City of Memphis v. Greene*, 451 U.S. 100, 120 (1981) (same).

[40] *Civil Rights Cases*, 109 U.S. 3, 17 (1883); *see also Public Utilities Commission of District of Columbia v. Pollak*, 343 U.S. 451, 461-62 (1952) (Fifth Amendment applies to and restricts "only the Federal Government and not private persons."); *Obleshchenko v. Ashcroft*, 392 F.3d 970 (8th Cir. 2004) ("Constitutional rights are rights against the government; that is, they ensure that the government will not act in a certain way."). It is interesting to note that in *Obleshchenko* the Eighth Circuit stated that "[b]ecause [constitutional rights are rights against the government, and] this is necessarily as true of rights secured by the fifth amendment as it is of any other constitutional right, we find it difficult to see how an individual, such as [an alien's] attorney, who is not a state actor, can deprive anyone of due process rights." Notwithstanding this statement the panel in *Obleshchenko*, recognizing contrary authority from other circuits, assumed without deciding that the alien petitioner did have a Fifth Amendment right to effective assistance of counsel, but denied relief on the ground that the petitioner had not shown prejudice. 392 F.3d at 972-73.

[41] *See, e.g. San Francisco Arts & Athletics, Inc. v. U.S. Olympic Committee*, 483 U.S. 522, 542-43 (1987) (where plaintiff alleges a violation of the Fifth Amendment, "[t]he fundamental inquiry is whether the [defendant] is a governmental actor to whom the

The standard for finding federal government action under the Fifth Amendment is the same as that for finding state action under the Fourteenth Amendment,[42] namely "whether there is a sufficiently close nexus between the [federal government] and the challenged action of the [private actor] so that the action of the latter may be fairly treated as that of the [federal government]."[43] This may occur, as is not true here, where a private actor exercises powers that are traditionally reserved exclusively to the government.[44] Importantly, the mere fact that a private actor performs a function that serves the public does not create a government action.[45]

These principles, applied here, compel the conclusion that Afanwi has not suffered any deprivation of his Fifth Amendment rights. Simply put, Afanwi's counsel was not a state actor, nor is there a sufficient nexus between the federal government and counsel's ineffectiveness such that the latter may fairly be treated as a governmental action. To the contrary, Afanwi's counsel was privately retained pursuant to 8 U.S.C. § 1362, and his alleged ineffectiveness — namely his failure to

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prohibitions of the Constitution apply."); *see also Correctional Services Corp. v. Malesko*, 534 U.S. 61, 66 (2001) (declining to recognize an implied constitutional right of action against private entities acting under color of federal law).

[42] *Gerena v. Puerto Rico Legal Services, Inc.*, 697 F.2d 447, 449 (1st Cir. 1983); *Warren v. Government Nat'l Mortgage Ass'n*, 611 F.2d 1229, 1232 (8th Cir. 1980).

[43] *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350 (1974).

[44] *Id.* at 352-53

[45] *Rendell Baker v. Kohn.* 457 U.S. 830, 842 (1982).

check his mailbox regularly and to file a timely appeal — was a purely private act. The federal government was under no obligation to provide Afanwi with legal representation,[46] and there was no connection between the federal government and counsel's failure to check his mail. Thus, Afanwi's counsel's actions do not implicate the Fifth Amendment, and accordingly counsel's alleged ineffectiveness did not deprive Afanwi of due process.[47] That Afanwi was denied an opportunity to petition this court for review of the BIA's November 29, 2005 Order may be unfortunate, but it is not a constitutional violation, and it is only the latter that we may redress. Afanwi's petition for review must accordingly be dismissed with respect to his claim of ineffective assistance of counsel.[48]

VI.

In summary, we have addressed each of the BIA Orders that are appropriately before us: the February 13, 2006 Order denying Afanwi's motion to rescind

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[46] *See supra* note 31; *see also* 8 U.S.C. § 1362 (1996).

[47] Of course, an alien's Fifth Amendment rights can be violated by state actors, such as the IJ or the BIA, if these actors prevent an alien from presenting his case.

[48] In *Figeroa v. U.S. INS*, 886 F.2d 76 (4th Cir. 1989), a panel of this Court assumed, without squarely addressing, the Fifth Amendment issue we resolve here. Although we are bound by the holding of *Figeroa*, *Doe v. Charleston Area Medical Center, Inc.*, 529 F.2d 638, 642 (4th Cir. 1975), we are not bound by the *Figeroa* panel's unwritten assumptions. *Brecht v. Abrahamson*, 507 U.S. 619, 630-31 (1993) (noting that *stare decisis* is not applicable unless the issue was "squarely addressed" in the prior decision); *Fernandez v. Keisler*, 502 F.3d 337, 343-44 n.2 (4th Cir. 2007) ("We are bound by holdings, not unwritten assumptions.").

and reissue the November 29 Order, and the May 12, 2006 Order denying Afanwi's motion to reopen immigration proceedings. We have also addressed the merits of Afanwi's ineffective assistance of counsel claim. We have not addressed the merits of the November 29, 2005 Order affirming the IJ's denial of Afanwi's asylum claim because Afanwi's petition for review of this Order was untimely.

For the above reasons, Afanwi's petition for review with respect to the BIA's November 29, 2005 Order, the BIA's February 13, 2006 Order, the BIA's May 12, 2006 Order, and Afanwi's claim of ineffective assistance of counsel must be denied.

PETITION FOR REVIEW DENIED

U.S. Department of Justice
Executive Office for
Immigration Review

Decision of the Board of
Immigration Appeals

Falls Church, Virginia 22041

File: A96 269 753 – Baltimore

Date:

In re: JOSEPH AFANWI

May 12, 2006

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Lawrence D. Rosenberg, Esq.

CHARGE:

Notice: Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)] – In the United States in violation of law

APPLICATION: Motion to reopen

This case was last before us on November 29, 2005, when we dismissed the respondent's appeal of the Immigration Judge's July 22, 2004, decision. The respondent now requests that we reopen proceedings due to his former counsel's ineffective assistance and new evidence he has obtained in support of his asylum application. The Department of Homeland Security (DHS) has not filed an opposition brief. The motion will be denied.

First, we will address the respondent's claim of ineffective assistance of counsel. The respondent claims that he was prejudiced by his former counsel's failure to timely file an appeal of the Board's decision with the United States Court of Appeals for the Fourth Circuit. While we recognize that the respondent has attempted to abide by the procedural requirements established in *Matter of Lozada,* 19 I&N Dec. 637 (BIA 1988), we note that we can only review due process claims in regards to proceedings before the Immigration Judge or the Board. Therefore, any ineffective assistance the respondent received subsequent to the final order of the Board and in connection with an appeal of the Board's decision is not within our jurisdiction.

We will now consider the respondent's claim that his case should be reopened due to events that arose after our November 29, 2005, decision. The respondent has submitted an affidavit from his stepsister with his motion (Exh. A). In that affidavit, his stepsister claims that the police came to his home in December 2005 and interrogated the family regarding the respondent's whereabouts (Exh. A). Although this evidence is new and previously unavailable, it fails to remedy the shortcomings of his claim, such as his lack of credibility, and further fails to establish that he is prima facie eligible for relief. *See INS* v. *Doherty,* 502 U.S. 314 (1992); *INS* v. *Abudu,* 485 U.S. 94 (1988); *Matter of Coelho,* 20 I&N Dec. 464 (BIA 1992); *see also* 8 C.F.R. § 1003.2(c)(1) (providing requirements for motion to reopen); We note that the affidavit does not establish that the police would have arrested, detained, persecuted, or tortured the respondent had he been home when they arrived.

Based on the foregoing, the motion to reopen will be denied.

ORDER: The motion to reopen is denied.

/s/ Roger A. Pauley
FOR THE BOARD

U.S. Department of Justice
Executive Office for
Immigration Review

Decision of the Board of
Immigration Appeals

Falls Church, Virginia 22041

File: A96 269 753 – Baltimore

Date:

In re: JOSEPH AFANWI

Feb. 13, 2006

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Thomas G. Corcoran, Esq.

ORDER:

PER CURIAM. The respondent has filed a motion to reissue the Board's November 29, 2005, decision. The motion is denied, as the decision was mailed to the address provided by prior counsel on a Notice of Entry of Appearance before the Board (Form EOIR-27) dated October 21, 2004. Further, there is no error attributable to the Board in the service of its decision to prior counsel.

/s/ Frederick D. Hess
FOR THE BOARD

U.S. Department of Justice
Executive Office for
Immigration Review

Falls Church, Virginia 22041

Decision of the Board of
Immigration Appeals

File: A96 269 753 – Baltimore

Date:

In re: JOSEPH AFANWI

Nov. 29, 2005

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Daniel Fisher-Owens, Esq.

ON BEHALF OF DHS: Christopher R. Coxe, Jr.
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)] – In the United States in violation of law

APPLICATION: Asylum and withholding of removal

In a decision dated July 22, 2004, an Immigration Judge denied the respondent's request for asylum and withholding of removal. The respondent's appeal will be dismissed.

We affirm the Immigration Judge's conclusion that the respondent has failed to establish past

persecution or a well-founded fear of persecution based on one of the five statutory grounds of race, religion, nationality, membership in a particular social group, or political opinion. *INS v. Cardoza-Fonseca,* 480 U.S. 421 (1987); *Matter of Dass,* 20 I&N Dec. 120 (BIA 1989); *Matter of Mogharrabi,* 19 I&N Dec. 439 (BIA 1987); *Matter of Exilus,* 18 I&N Dec. 276 (BIA 1982); *Matter of Sun,* 11 I&N Dec. 872 (BIA 1966). In the decision, the Immigration Judge reaches various conclusions regarding the respondent's claim to asylum, including finding that the respondent was not credible, that parts of his story were implausible, and that he had failed to meet his burden of proof. While we agree with the respondent that the Immigration Judge engaged in some unwarranted speculation, we do not find her overall conclusion, that the testimony was not sufficiently credible and the evidence presented not adequate to support the respondent's burden of proof, to be clearly erroneous. To the extent the respondent argues that the Immigration Judge failed to consider all the evidence, neither Immigration Judges nor this Board are required to discuss every single piece of evidence in the record and provide an exegesis on every contention raised, as long the decision reflects meaningful consideration of the relevant substantial evidence. *See Abdel-Masich v. INS,* 73 F.3d 579 (5th Cir. 1996); *Dashto v. INS,* 59 F.3d 697 (7th Cir. 1995); *Casalena v. INS,* 984 F.2d 105 (4th Cir. 1993). While not mentioning some evidence specifically, we have no reason to doubt that the Immigration Judge considered all the evidence of record.

An asylum applicant bears the evidentiary burden of proof and persuasion, and where there are significant, meaningful evidentiary gaps, applications

will ordinarily have to be denied for failure of proof. *Matter of Dass, supra.* Despite the respondent's contention on appeal, the Immigration Judge did consider his application for withholding of removal under the appropriate, higher standard of proof and we find no reason to remand the record for further proceedings. As it does not appear that the Immigration Judge erred in her conclusion that the respondent has not presented sufficient evidence or sufficiently credible testimony in support of the claim, the appeal will be dismissed. *See Matter of S-M-J-*, 21 I&N Dec. 722 (BIA 1997); *Matter of Dass, supra*; *Matter of Mogharrabi, supra.*

ORDER: The appeal is dismissed and the decision of the Immigration Judge is affirmed.

/s/ [illegible]
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
BALTIMORE, MARYLAND

IN THE MATTER OF	)	**IN REMOVAL PROCEEDINGS**
	)	
AFANWI, Joseph	)	
	)	**Case #96-269-753**
RESPONDENT	)	

CHARGE:
INA § 237(a)(1)(B), as amended, in that after admission as a nonimmigrant under **section 101(a)(15)** of the Act, Respondent remained in the United States for a time longer than permitted.

APPLICATIONS:
Asylum pursuant to **INA § 208**; Withholding of Removal pursuant to **INA § 241(b)(3)**; Withholding of Removal pursuant to **Article 3 of the Convention Against Torture.**

APPEARANCES

ON BEHALF OF RESPONDENT

Ichiro Morinaga &
Sarah Warlick
Center for Applied
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Georgetown University
School of Law
111 F. Street, N.W.
Washington, D.C. 20001

ON BEHALF OF DHS

Christopher Coxe
Assistant Chief
Counsel
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MEMORANDUM OF DECISION AND ORDER

I. Procedural History

Respondent is a thirty-two-year old male, native and citizen of Cameroon. He was admitted to the United States at Washington, D.C. on or about July 22, 2002 as a nonimmigrant B-1 with authorization to remain in the United States for a temporary period not to exceed January 23, 2003. Respondent remained beyond such period without authorization from the Department of Homeland Security (Government). Subsequently, on March 11, 2003, the Government issued Respondent a Notice to Appear (NTA) alleging the following: (1) that Respondent is not a citizen or national of the United States; (2) that Respondent is a native and citizen of Cameroon; (3) that Respondent was admitted to the United States at Washington, D.C. on or about July 22, 2002 as a nonimmigrant B-1 with authorization to remain in the United States for a temporary period not to exceed January 23, 2003; and (4) that Respondent remained beyond such period without authorization from the Department of Homeland Security (Government). The NTA charges Respondent with removability pursuant to INA § 237(a)(1)(B) as one who, after admission as a nonimmigrant under section 101(a)(15) of the Act, has remained in the United States for a time longer than permitted.

At a Master Calendar Hearing held on May 13, 2003, Respondent admitted allegations one through four and conceded the charge of removability. In the event of removal, Respondent declined to designate a country and the Court designated Cameroon at the request of the Government.

At the conclusion of an Individual Hearing held on April 14, 2004 the Court reserved its decision to further review the testimony and evidence presented. The Court has considered all evidence and testimony, even if not specifically addressed in this decision. Based on the following findings, the Court shall deny Respondent's applications for asylum, withholding of removal under INA § 241 (b)(3), and withholding of removal pursuant to Article 3 of the Convention Against Torture. The Respondent is not eligible for voluntary departure as he was not physically present in the U.S. for one year prior to service of the NTA. See INA § 240(B)(b)(1)(A).

II. **Evidence Presented**

A. **Testimony**

Direct Examination of Respondent

Respondent testified that he left Cameroon because of his involvement in the Social Democratic Front (SDF) and the Southern Cameroons National Council (SCNC), a group that advocates for the independence of Southern Cameroon. He stated that the government of Cameroon is currently looking for him and that he will be arrested or killed if he returns. Respondent indicated that he had two encounters with the police in 1990, two in 1992, one in 1994, one in 1997, and one in 1999. Respondent testified that he led peaceful SDF demonstrations. At a demonstration to launch the SDF on May 26, 1990, the police arrested, beat and shot and killed three people. Respondent testified that he was able to escape and that he hid in the ceiling of his friend's house in order to escape detection by police. He indicated he left his hiding place to attend church on June 7, 1990. He stated that it was safe for him to do

so since the police had surrounded the chairman's residence. Respondent testified that as he was returning home from church, a police van pulled beside him. Although Respondent attempted to run away, a police officer caught him and proceeded to kick and beat him on his head, chest and the soles of his feet. According to Respondent, he lost consciousness and was cold and muddy when he awoke. He stated that he heard the police say something in French, possibly relating to the SDF, before losing consciousness again. The next day, Respondent was taken to the hospital, where he remained from June 8-10, 1990.

Respondent indicated that he participated in another rally in 1992 in Bamenda. He stated that the demonstration was organized to protest the rigging of the election by the government. Respondent testified that as he was leading a group of demonstrators in marching and chanting anti-government slogans, the police stopped him and ordered him to sit on the ground. According to Respondent, the police then beat him on the head and kicked him on the stomach and back. Respondent stated that he was able to escape by crawling away and that he found shelter in a woman's kitchen. He testified that the woman washed his face, provided him with water, and gave him money to pay for transport home. Respondent testified that he believes the police were trying to discover who had sent the protestors and why they were on the streets.

Respondent's next encounter with the police took place in November 1992. Respondent testified that as he was approaching Finance Junction, he noticed a large crowd of people. He stated that a police officer

stopped him and requested identification. Suddenly, Respondent was hit on the head and knocked to the ground, where he lay bleeding. Respondent indicated that the police officer kicked his stomach, trampled on his feet, and beat the soles of his feet. He testified that as he lay there bleeding, the officer stated that Respondent's blood was like water and that it could be replenished by drinking more water. Respondent testified that he did not attempt to run away because he was afraid of being shot or being targeted as a suspect. According to Respondent, another police officer discovered Respondent and took him to a Baptist clinic. Because the clinic was closed, Respondent was forced to return home, where he shaved his head and applied iodine to his cuts.

Respondent stated that he officially joined the SCNC in 1997 in order to assist the Southern Cameroons' struggle but that he had participated in SCNC activities prior to that time. He testified that he learned about the struggle at Yaounde University, from reading books, and from hearing the chairman speak. Respondent stated that the SCNC called for a peaceful solution to the problem and that it did not advocate violence. He indicated that he never used violence and that he was never charged with a crime by the Cameroonian government. Respondent stated that he studied at Yaounde University and that Professor Chiabi's teachings on the plight of Anglophones impacted him greatly. Respondent stated that he lived in Yaounde but that he regularly visited his family and attended SCNC meetings in Bamenda. He testified that he was not politically active in Yaounde but that he was very involved in politics in Bamenda.

Respondent stated that in 1994, he chaired an alumni association that aimed to empower youth regarding their civic rights. He indicated that he regularly presided over SCNC meetings and briefed his chairman. Respondent stated that the police knew of his involvement in the Civil Rights Empowerment Group (CREG) because at a rally on May 19, 1994, CREG called for a total boycott of the May 20th government festivities. According to Respondent, three police officers attacked him on his way home. One of the officers said something in French at which time the officers proceeded to hit Respondent's face and nose and kick his body. Respondent indicated that the officers told him to stop organizing rallies and walked away.

According to Respondent, his next encounter with police took place on April 5, 1997. He stated that he had returned to Akum for Easter and that at 6 a.m. the next day, four police officers arrived at his home to arrest him. He indicated that the officers handcuffed him, brandished a warrant, and beat him on the head and stomach. Respondent stated that in response to his screams, his mother rushed out, after which she was beaten and ordered to sit quietly on the floor. He testified that the police searched the house and took Respondent's SCNC card and other SCNC letters and petitions. Next, they escorted Respondent to a taxi where he was forced to sit between two officers in front and two in back during the trip to Bamenda police headquarters. Once there, Respondent stated that the police took down his name, address, and the names of his parents. Next, they kicked him and beat him on the shins and the soles of his feet. He stated that the police also beat him with a rubber baton on his head, back and

stomach. According to Respondent, the police then removed his handcuffs and ordered Respondent to strip naked.

Respondent stated that he was jailed in the Provincial Police Headquarters in a cell that was narrow, dark, and dirty. He indicated that his cell had no blankets or furniture and that it contained only a single bucket in the corner. Respondent testified that the next morning, the police interrogated Respondent about what he was doing on March 28-29, 1997 and that he replied that he was in Yaounde during that time. When the officer asked if Respondent knew why he was arrested, Respondent answered in the negative. According to Respondent, the officer laughed and told Respondent that the police suspected him of terrorist acts committed by the SCNC. He then forced Respondent to promise that he would abstain from participating in SCNC activities by offering to release him.

Respondent testified that he was not involved in the March 28-29 attacks and that he believes that the SCNC was not involved. He indicated that during his time in detention, the police subjected him to "morning coffee, " a technique where Respondent was beaten on the soles of his feet and body, and then forced to jump on sharp gravel while singing anti-SCNC slogans. Respondent testified that "morning coffee" took place every day. He further stated that as a result of so many beatings, his right testicle became swollen and painful and that he was bruised on his feet and body. Respondent testified that he passed out on April 10, 1997 and that he woke up the next morning in Bamenda Provincial Hospital. He stated that his mother was present when he awoke but that

he never asked her how she learned of his whereabouts. Respondent indicated that his mother transported him to Mbengwi District Hospital because he was afraid that the police might realize he had not died and would pursue him. He stated that he remained hospitalized from April 11-15, 1997.

Respondent testified that he was tempted to quit the SCNC but that he changed his mind when he realized he was fighting for posterity. He stated that the police knew he continued his SCNC activities and that on September 27, 1999 he was arrested for chairing an SCNC meeting in Akum. Respondent testified that the police stormed the building, ordered Respondent to stop the meeting, and began collecting SCNC documents. The police transported all twenty SCNC members to Bamenda Provincial Police Station, where they registered their names and addresses. Respondent testified that the police segregated the sexes then ordered them to strip naked. Next, the police jailed them and beat Respondent. Respondent testified that the guards administered "morning coffee" frequently since they believed he was the group leader. He stated that he remained in jail from September 27-October 9, 1999.

Respondent indicated that his imprisonment ended when his mother learned from his uncle's friend, a warden, that the SCNC members were to be transferred to a maximum security prison in Yaounde. Because the prison is notorious for cruel treatment and even death, Respondent's mother went to the home of the police officer and begged him to help. Respondent stated that he believes the officer agreed to help due to his friendship with Respondent's uncle. He testified that at 3:30 a.m. on

October 9, 1999, a police officer called his name. According to Respondent, the police officer told him to run. Respondent stated that after stumbling and thinking he would be shot in the back, he heard his mother call his name. He testified that his uncle and mother were waiting and that they took him to Mbengwi where it was safer.

Respondent stated that he went into hiding in the church in Mbengwi. While there, Respondent trained as an evangelist and traveled into the interior to evangelize with his pastor. He stated that he evangelized to as many as 15 to 20 people at one time. Respondent testified that he fears returning to Cameroon due to the government crack down on SCNC members, adding that government troops have been sent throughout Cameroon to arrest SCNC members. He stated that his mother visited him twice while he was hiding and that during her first visit, she told him that the police had issued a summons ordering Respondent to report to Kumba police station.

Respondent stated that he decided to leave Cameroon as a result of government actions against the SCNC. He testified that on October 14, 2001, when SCNC was celebrating its fourteenth anniversary of independence, the government deployed troops to crack down on demonstrators. As a result, three demonstrators were shot and killed. In addition, the government arrested 100 people in Bamenda and 500 people in Kumba. Respondent believed he was in imminent danger and needed to escape. He indicated that he was able to escape Cameroon because his pastor assisted him in making his travel documents. Respondent stated that his

pastor went to Bamenda to obtain Respondent's passport but does not know how he did so. Respondent testified that he never asked his pastor how he obtained the passport and was unable to explain why he never asked him. He testified that on July 15, 2002, he traveled to the U.S. embassy in Yaounde and told the consular officer that he was traveling to the U.S. to attend a peacemaking conference organized by Silver Spring Presbyterian church. Respondent stated that his answer was honest. He further testified that the church in Silver Spring sponsored him and paid for his airline ticket.

Respondent stated that a family friend, Oumarou, is a police commissioner who works at the Douala airport. He testified that Oumarou accompanied him through checkpoints at the airport. Respondent stated that Oumarou helped him to navigate the checkpoints because of his connection with the head of Respondent's family and because Respondent might have been arrested otherwise.

According to Respondent, he arrived in the United States on July 22, 2002. He stated that at the time, he planned to remain here for approximately six months. Respondent indicated that he attended the church conference. Respondent stated that he joined SCNC North America to continue his fight "against the yoke of the French military government." and that he has attended meetings and protests here. He indicated that he demonstrated in front of the Cameroonian embassy on May 20, 2003 and that his photo appears on SCNC's website.

Respondent testified that he belongs to the Silver Spring Presbyterian church and that he volunteers as a Sunday School teacher. He indicated that he

changed his mind about returning to Cameroon when he learned that the talks were not going well and that the police were still searching for him. Respondent stated that he explained his situation to church leaders and that they advised him to apply for asylum. He testified that if returned to Cameroon, he would continue to participate in the SCNC because he "feels that our liberation is soon and that it's necessary for me to continue the fight and to bequeath a liberal and a fair society for my children." Respondent stated that he would like to return to Cameroon because he misses his family. He indicated that the government of Cameroon has beaten his mother and assaulted his wife in its quest to find him. Respondent stated that in 1999, an officer told him that he would be shot on sight because he is an escapee. He stated that the government is still looking for SCNC members and that two boys from Cameroon just got "disappeared" from the airport. Respondent indicated that his return to Cameroon would be tantamount to suicide because he is certain he would be arrested at the airport and either killed or imprisoned forever.

Cross Examination of Respondent

On cross examination, Respondent testified that he joined the SCNC in 1997. He stated that the SCNC was formed in 1993. When challenged, he stated that the SCNC was formed in 1994, but that the first Anglophone conference was held in Buea in 1993. He indicated that the second Anglophone conference was held on May 1, 1994 in Bamenda and resulted in the formation of the SCNC. Respondent testified that he became a youth coordinator in Akum shortly after he joined the SCNC in 1997. In that

position, Respondent organized the youth and educated them about the Anglophone struggles. He testified that the SCNC has a separate youth branch, Southern Cameroon League. He does not recall when it was formed, but stated that it was already in existence by the time he joined. Respondent indicated that he does not know who created the Southern Cameroon League but that it is currently chaired by Akwanga, who lives in Nigeria. He stated that the chair of the SCNC North America is Emile Mondua. Respondent testified that he does not know how long Mondua has held that position nor who preceded him. He testified that he is familiar with the SCNC organizational structure, indicating that it is composed of the National Executive, the zones (including the African zone with headquarters in Nigeria, the North American zone, and the European zone with headquarters in London). He further indicated that within Cameroon, the SCNC consists of the northern zone headed in Bamenda, the southern zone headed in Buea, as well as many chapters and branches.

Respondent testified that he sympathized with the SDF, which was created in 1990. He testified that he never joined the SDF and that he has not sympathized with the SDF since the presidential elections in 1992. Respondent indicated that the SDF is a political party that seeks to rule Cameroon. He explained that the main difference between the SDF and the SCNC is that the SCNC wants total independence for Southern Cameroon. Respondent stated that he was not involved in politics between 1992 and 1994.

Respondent stated that when he was beaten by police on June 7, 1990, he did not understand much of what the officers were saying in French. However, he understood enough to know that the police suspected him of being involved in the SDF. Respondent testified that he was beaten in November 1992. He conceded that his affidavits stating that he was arrested are incorrect and indicated that he was able to crawl away after about 30 minutes when the officer was distracted. Respondent stated that his second encounter with police took place within a few weeks, during late November 1992. When challenged as to why this information is not contained in his first affidavit, Respondent testified that it happened so long ago that he had simply forgotten. He stated that he recalled the incident during the course of his discussions with his attorneys. Although Respondent indicated that he sustained a serious head wound, he conceded that such information was not included in his first affidavit. He explained the discrepancy by saying that someone helped him to prepare his first application.

Respondent indicated that he does not advocate violence and that, to the best of his knowledge, the SCNC has never advocated the use of violence. He indicated that he is aware that the youth wing of the SCNC created a military wing in Nigeria.

According to Respondent, he attended the University of Yaounde from 1994 until 1999. He stated that it was very difficult to gain admission because he did not know much French at that time. Respondent testified that he learned some French in 1993-1994 by going to the market. He stated that it took him five years to complete a three-year course

due to the language difficulties he experienced. Respondent indicated that he had help in completing the application process since he was not very proficient in French at that time. He added that he paid to have his notes translated during the first years and that he was able to sit for his exams in English. Respondent stated that he does not read or write French but that he is able to speak it now.

Respondent stated that he joined the SCNC at the beginning of 1997, before his arrest on April 5, 1997. He further stated that he was elected to the position of youth coordinator for Akum village before his arrest. Respondent testified that on April 5, 1997, four officers in civilian clothing came to his house and took him to the police station in a taxi. After five days, Respondent awoke in the Bamenda Provincial Hospital. Respondent stated that his mother never told him how she discovered he was in the hospital. He was unable to explain why he never asked her. Respondent stated that he does not know why he was taken to Bamenda on September 27, 1999, adding that it is probably because there is no jail or police station in Akum. Respondent stated that Akum is about a 20 to 25 minute drive from Bamenda. He testified that in his position as youth coordinator, he had monthly meetings with the chairman of the northern zone and that he regularly met with Mbinglo Humphrey. Respondent stated that he does not know why Mr. Humphrey did not provide details in his affidavit about the problems Respondent experienced.

Respondent testified that after his escape on October 9, 1999, he went into hiding in Mbengwi, about 1½ to 2 hours from Akum. He stated that the

police officer had warned his mother that he would be shot on sight. He testified that he stopped participating in the SCNC, and that the only exception was when Mr. Humphrey brought him food on one occasion. Respondent indicated that he asked his mother to get him an SCNC card and that she was able to obtain one on his behalf on March 5, 2000. He testified that during the two and one-half years he spent in Mbengwi, the police never found him, nor was he arrested, harassed or physically mistreated.

When questioned by the Court, Respondent testified that he did not replace his SCNC card until he was in hiding in 2000. He stated that he did not get a new card in 1997 because the SCNC office was not functioning. He stated that in 1998, he no longer saw the need to do so since everyone he knew already belonged. Respondent testified that by 2000, he knew he would need an SCNC card to flee Cameroon.

Respondent stated that he is married and that he met his wife in 1995 while she was living in Ngie. He indicated that they married at the High Court of Mbengwi during the time Respondent was in hiding. Respondent testified that even though he was trying to avoid the police, he felt safe going to the Court because he knew that the authorities did not know his whereabouts. He added that he was not afraid because there is a distinction between the police and the courts. Respondent indicated that his name appears on the marriage certificate and that he registered with the civil status registrar. He testified that although he had lived in Mbengwi for more than one year, his marriage certificate lists him as a resident of Akum because Akum is his permanent

address. He stated that the police issued a summons on March 25, 2002, about one month after his marriage. Respondent testified that his mother gave the summons to a local chief who later brought it to the United States. He indicated that his photo was taken in Mbengwi and that his pastor used the photo to obtain a passport on Respondent's behalf.

Respondent stated that Mbengwi is a division and that it is smaller than Silver Spring. He testified that he told the consular officer he wanted to come to the U.S. to attend a conference but that he planned to return to Cameroon. Respondent indicated that he had five different encounters with the police and that he still suffers pain in his testicle. He testified that he only has one testicle but stated that he never had surgery. When questioned about the doctor's finding that he has a scar consistent with the removal of a testicle, Respondent insisted that he never had an operation. Rather, his testicle just became very small. He added that the doctor must have been mistaken.

Respondent testified that the peacemaking conference lasted one week. He stated that he had a round trip ticket but that he was unsure of his scheduled return date to Cameroon due to the fact that his church had made all of his travel arrangements. Respondent testified that he made his decision to remain in the United States in October. He indicated that he did not know the date on his return ticket and that he allowed the church to handle all the logistics. Respondent testified that he never asked the church when he was supposed to return to Cameroon.

Respondent stated that a family friend, Oumarou, helped him to navigate the checkpoints at Douala

airport. He testified that Oumarou took his passport and then returned it to him. Respondent stated that he never asked Oumarou what he had done and that Oumarou never explained. Respondent stated that he was able to proceed through the checkpoints without being stopped because he was with a senior officer. He indicated that no one looked at his passport and that he was able to get through the airport without any problems. When asked why Oumarou would have stamped his passport if no one were going to look at it, Respondent replied that as a senior officer, Oumarou knew what he was doing. He added that he is unsure why he has the stamp in his passport but that both his passport and visa are in his name and contain his photo.

Redirect

On redirect, Respondent testified that it is possible that someone from the hospital knew his mom was a nurse and thus informed her of his whereabouts. He stated that people in Cameroon routinely obtain passports for others. Respondent indicated that he was married by a magistrate and that there were no police officers at the court house. He stated that his church booked his flight and that he does not know who chose the return date listed on the ticket.

Direct Examination of Dr. Cogar

The Government stipulated to Dr. Cogar's expertise. Dr. Cogar testified that she is employed twenty hours per week as the Clinical Director at Advocates for Survivors of Torture and Trauma and that she also maintains a private practice. The witness opined that Respondent is suffering from Post Traumatic Stress Disorder (PTSD). She

indicated that she met with Respondent on a total of three occasions and that she met with him twice before writing the psychological assessment. She stated that she spent about three hours interviewing Respondent and indicated that she used a standard psychological interview, including a mental status exam and history. Dr. Cogar added that diagnoses can typically be made in one session, but that she prefers to have a minimum of two sessions.

Dr. Cogar testified that she has not spoken to Respondent since March 9, 2004 and that she did not read his affidavits until after meeting with him. She indicated that she noticed two discrepancies between Respondent's first and second affidavits. The first discrepancy involved the day of the week Respondent went to church and the second discrepancy involved a period of time when Respondent was detained and beaten by the police. When questioned whether these discrepancies are significant, Dr. Cogar stated that the discrepancy regarding the day of the week can be explained by normal memory processes which include loss of details over time. She testified that since Respondent attended church frequently, it is probable that his memories merged, causing Respondent to lose details. With regard to the second discrepancy, Dr. Cogar opined that it is due to the effect of PTSD and trauma on memory, which tends to make people remember less clearly, feel confused, and to merge two different episodes. She added that during the time Respondent wrote his first affidavit, Dr. Borthwick's assessment described Respondent as being confused and getting very little sleep. Dr. Cogar opined that this would affect Respondent's memory.

Dr. Cogar stated that she formed her opinion about Respondent before reading Dr. Borthwick's affidavit or Respondent's affidavit. She indicated that she did not consult with Respondent's current psychiatrist and current psychotherapist until after formulating her opinion. Dr. Cogar stated that she and her colleagues agree that Respondent suffers from PTSD. She indicated that Respondent's psychiatrist prescribed him anti-depressant medication and that Respondent has significantly improved since January. The witness stated that it is in Respondent's best interest to continue treatment with both the psychiatrist and psychotherapist. She added that it is important for Respondent to remain on medication for a minimum of six months in order to give him an opportunity to have the symptoms resolve because symptoms of PTSD tend to continue over long periods of time and also tend to recur if there are significant stressors.

Dr. Cogar testified that PTSD is a psychological syndrome that people are known to develop after they have experienced or witnessed severe trauma to someone in their family. She stated that there are three categories of symptoms in PTSD: symptoms of re-experiencing, avoidance, and arousal. Dr. Cogar testified that Respondent has symptoms in all three categories, including nightmares and flashbacks, avoidance of police and crowds, a sense of hopelessness, and difficulty sleeping and concentrating. She indicated that Respondent's symptoms were quite severe initially but that medication helped to alleviate Respondent's symptoms by the second and third sessions. When questioned by the Comi as to how she knows that Respondent's symptoms have lessened, Dr. Cogar

testified that Respondent told her that he was able to sleep better, that he was experiencing fewer intrusive memories and that he felt less anxious. She stated that Respondent's psychiatrist also corroborated his improvement.

Dr. Cogar testified that Respondent's symptoms significantly affected his functioning. She opined that the cause of Respondent's PTSD was a significant trauma of the type Respondent described to her. When asked whether Respondent's failure to ask his mother how she knew he had been hospitalized was unusual, the witness testified that when people are severely tortured, they typically develop acute stress disorder which, like PTSD, includes symptoms of confusion and an inability to think clearly. Therefore, Dr. Cogar stated that she would not expect a torture survivor to ask logical questions. She further stated that the blows to Respondent's head likely affected his mental abilities, at least temporarily. When asked whether she found it strange that Respondent did not check the departure date on his return ticket, Dr. Cogar stated that she did not, particularly since Respondent was fleeing Cameroon because he thought he would be killed. Dr. Cogar testified that she is quite certain about her diagnosis and bases that certainty on the fact that Respondent was consistent during each of his sessions and that his psychological presentation was congruent with his story and similar to that of other torture survivors. She added that there was nothing else in Respondent's history that could account for the symptoms Respondent was having. The witness testified that she found Respondent to be credible and that she found no evidence of

malingering. She added that three other mental health professionals also came to the same diagnosis.

When asked whether she has ever diagnosed someone with PTSD and then subsequently changed the diagnosis, the witness answered in the negative. She stated that she has refused to testify on behalf of people whom she believed were lying to her or whose presentations were so vague that she could not make a diagnosis. Dr. Cogar stated that any kind of stressful situation, especially one with similar characteristics to the experiences Respondent had, would aggravate Respondent's PTSD. She indicated that Respondent is very afraid of returning to Cameroon. Dr. Cogar testified that Respondent's current treatment cannot prevent future recurrence of PTSD as people are known to become symptomatic again long after the original trauma, especially if they are faced with a similar kind of trauma.

Cross Examination of Dr. Cogar

On cross examination, Dr. Cogar testified that Respondent was referred to her by his attorneys for the purpose of a psychological assessment in connection with his asylum case. The witness stated that her role was to perform a clinical assessment. She indicated that an initial intake of Respondent was done by phone and that he met her intake criteria, i.e. that he was a victim of torture. Dr. Cogar testified that her first session with Respondent took place in January and that he had already been referred and accepted by then. She indicated that Respondent's symptoms were self-reported and that she observed the level of distress he experienced as he described his trauma during the psychological interview. The witness stated that she did not

interview any of Respondent's family members in Cameroon. Dr. Cogar testified that she looks very carefully at the symptoms people describe to her and that she observes their behavior very carefully. She stated that she does not provide any cues as to what she expects to see and that she performs her evaluations more than once. After this, she performs a detailed, systematic review of her observations and comes to a psychological diagnosis. Dr. Cogar indicated that the purpose of an evaluation is to determine whether or not there is a psychological diagnosis. She stated that Respondent was scheduled for treatment by the time she met with him.

Dr. Cogar testified that the threshold inquiry for any PTSD case is whether there was exposure to any traumatic event, adding that the exposure can be to oneself or to another family member. She indicated that one can be exposed by simply hearing that a member of one's family had been tortured. She added that witnessing such an event could also trigger symptoms of PTSD. When asked whether hearing from his mother that his father had been killed in a car accident would trigger PTSD symptoms, Dr. Cogar stated that this would be unlikely because it is not an unusual event. When given a hypothetical by the Court about a person hearing that a family member had been taken as a prisoner of war, Dr. Cogar indicated that such an event would likely result in PTSD. She stated that a person need not be the direct victim of an event in order to experience genuine symptoms of PTSD. She added that it is important to understand that one is more likely to develop PTSD after experiencing direct trauma to himself or repeated traumas.

Dr. Cogar stated that the trauma must affect someone personally in order for him to develop PTSD. She stated that it is unlikely that someone would develop PTSD simply because he heard that someone in the neighborhood has been traumatized. She indicated that the most likely reason people get PTSD is because they have experienced severe trauma to themselves. Dr. Cogar added that studies of torture victims indicate that approximately 50% develop PTSD. She stated that it is critical to look at a patient's history to make sure that there were no previous psychological symptoms of PTSD before making a diagnosis. The witness stated that there was no evidence that Respondent had any psychological history before he experienced trauma. Dr. Cogar stated that the discrepancies between Respondent's two affidavits can be explained by the fact that trauma affects memory such that one tends not to remember all the details of an event. She added that she did not find anything implausible in Respondent's story.

Dr. Cogar stated that Respondent is experiencing avoidance symptoms. When asked whether it is consistent with avoidance for Respondent to participate in the same kinds of political activities that got him into trouble in Cameroon, the witness responded that many of her patients have found it quite helpful because it allows them to have a peaceful experience with a support system. She explained that clinical avoidance means trying to control a flood of symptoms and that Respondent's participation in a demonstration at the Cameroonian Embassy would not be inconsistent with that since the situation here is much different from the one in Cameroon. She indicated that she believes that

Respondent's participation in SCNC events will prove helpful to him in that it will teach him that he can rely on other people.

B. Documentary Evidence

The following exhibits were received and admitted into evidence:

Exhibit 1:

- Notice to Appear dated February 6, 2003

Exhibit 2:
Submitted by Respondent

- Written Pleadings dated April 8, 2004

Exhibit 3:
Submitted by Respondent

- Application for Asylum and Withholding of Removal and Supporting Documents:
  - Respondent's Affidavit
  - Letter of Acknowledgment from Reverend Tende David
  - Essential Drug Program Information
  - Respondent's Cameroonian Passport
  - Respondent's U.S. Visa
  - Respondent's I-94
  - Respondent's Marriage Certificate
  - The Heron, dated September 18-25, 2002
  - The Star, dated January 9, 2002
  - The Post, dated January 7, 2002
  - The Post, dated January 11, 2002
  - Respondent's SCNC Card

- Respondent's SCNC Subscription Card
- Letter from SCNC Chairman Mbinglo H. Humphrey dated October 21, 2002
- Affidavit of John Fomunyoh dated November 12, 2002
- Respondent's Medical Certificate
- Letter from Respondent's Mother

Exhibit 4:
Submitted by Government

- U.S. Department of State Country Report on Human Rights Practices in Cameroon (2003)
- U.K. Extended Bulletin on Country Conditions in Cameroon, dated November 2002

Exhibit 5:
Submitted by Government

- Guidelines for Differentiating Malingering from PTSD
- Forensic Validity of PTSD Diagnosis

Exhibit 6:
Submitted by Respondent

- Respondent's Brief in Support of His Application for Asylum
- Witness List
- A-Clarification to Respondent's I-589 and original I-589
- B-Respondent's Affidavit
- C-Affidavit of Victor T. Le Vine
- D-Curriculum Vitae of Victor T. Le Vine

- E-Affidavit of Professor Joseph Takougang
- F-Curriculum Vitae of Professor Joseph Takougang
- G-Affidavit of Dr. James Borthwick
- H-Curriculum Vitae of Dr. James Borthwick
- I-Statement and Medical Report of Dr. Peter Basch
- J-Curriculum Vitae of Dr. Peter Basch
- K-Statement of Dr. Walters Shu
- L-Statement of Beatrice Fon
- M-Affidavit of Pastor J. Currie Burris
- N-Affidavit of Mbinglo H. Humphrey
- O-Affidavit of John Formunyoh
- P-Affidavit of Melysa Sperber
- Q-Affidavit of Susan E. Morinaga
- R-Respondent's Passport
- S-Respondent's U.S. Visa
- T-Respondent's Airline Ticket/Itinerary
- U-Respondent's Birth Certificate
- V-Respondent's Marriage Certificate
- W- Birth Certificate for Mildred Lum Afanwi
- X-Photograph of Mildred Lum Afanwi
- Y-Respondent's First School Leaving Certificate
- Z-Respondent's Primary School Leaving Certificate-Religious Knowledge
- AA-Respondent's University of Yaounde transcripts, with translation

- BB-Respondent's Bachelor's Degree Success Testimonial, with translation
- CC-Respondent's SCNC Membership Card
- DD-Respondent's Essential Drug Program Consultation Book
- EE-Medico-Legal Certificate and Health Attestation from Dr. Walters Shu
- FF-Article from September 18-25, 2002 issue of The Heron and Search Engine Results Showing the Phone Number Used to Trace Journalist Randy Joe Sa'ah
- GG-Police Summons, dated March 5, 2002
- HH-Attestation from Pastor David Tende of the Presbyterian Church in Cameroon
- II-Letter of Acknowledgment from Pastor David Tende
- JJ-Conference Brochure-Commitment to Peacemaking
- KK-Photograph of Respondent at Peacemaking Conference
- LL-2003 Directory of Silver Spring Presbyterian Church
- MM-SCNC U.S. Subscription Card
- NN-Photograph of Respondent and Other SCNC Members Protesting outside the Cameroonian Embassy
- OO-Photograph of Respondent and Other SCNC Members Protesting outside the Cameroonian Embassy, as posted on the SCNC U.S. Website
- PP-Letter and Envelope from Beatrice Fon

- QQ-Amnesty International's 2003 Report for Cameroon
- RR-Amnesty International's 2002 Report for Cameroon
- SS-Amnesty International's 2001 Report for Cameroon
- TT-Amnesty International's 2000 Report for Cameroon
- UU-Amnesty International's 1999 Report for Cameroon
- VV-Report of the Special Rapporteur to Cameroon
- WW-U.S. State Department Report for Cameroon (2002)
- XX-U.S. State Department Report for Cameroon (2000)
- YY-U.S. State Department Report for Cameroon (2002)
- ZZ-"Every Morning, Just Like Coffee," Torture in Cameroon
- AAA-Cameroon Country Assessment, March 1999
- BBB-Human Rights Watch, Cameroon, 1990
- CCC-"The Reunification Question in Cameroon History: Was the Bride an Enthusiastic or a Reluctant One?
- DDD-Resource Information Center Response to Information Request # CMR 03005 ZCH
- EEE-BBC News, "Cameroon Separatists Killed"
- FFF-BBC News, "Timeline: Cameroon"

- GGG-The Fight for Self-Determination
- HHH-Anglophone Problem: SCNC: Emergence of Military Wing! Jailed Youth Leader Tells BBC that Military Wing Facilitated His Escape from Kondengui Prison

Exhibit 7:
Submitted by Respondent

- III-Affidavit of Professor Victor T. Le Vine, dated October 28, 2003 (marked for identification purposes only as the Government did not have a copy)

Exhibit 8:
Submitted by Respondent

- JJJ-Affidavit of Emmanuel Chiabi dated February 23, 2004
- KKK-Affidavit of Dr. Mary Cogar dated February 24, 2004

Exhibit 9:
Submitted by Respondent

- Curriculum Vitae of Dr. Mary Cogar

Exhibit 10:
Submitted by Respondent

- LLL-Affidavit of Professor Victor T. Levine, dated April 1, 2004
- MMM-Statement of Dr. Peter Basch, dated March 31, 2004
- NNN-Statement of Beatrice Fan, dated March April, 2004

- OOO-February 9-16, 2004 edition of The Heron
- PPP-February 25-March 3, 2004 edition of The Heron
- QQQ-March 10-17, 2004 edition of The Heron

III. Position of the Parties

A. Respondent

Respondent avers that he is an SCNC member. He argues that he has been persecuted and tortured by the Cameroonian government on account of his political opinion and on account of his membership in the Anglophone minority. Respondent asserts that he has met the statutory requirements for asylum and that he merits a favorable exercise of discretion.

B. Government

The Government argues that Respondent is not credible and has failed to meet his burden of proof. It contends that Respondent has not provided sufficient evidence to corroborate his claims nor has he offered a reasonable explanation for his failure to do so. Finally, the Government avers that Respondent has failed to show that internal relocation proved impossible.

IV. Statement of Law and Findings of Fact

A. Timely Filing of Asylum Application

According to INA § 208(a)(2)(B), an applicant must file his application for asylum within one year of the date of his arrival in the United States. For the purposes of this section, the applicant has the burden of proving by clear and convincing evidence that the application was filed within one year, or that he qualifies for an exception to the deadline. *See* 8

C.F.R. § 1208.4(a)(2)(i). Where an applicant fails to timely file his application, or any supporting documents as required under 8 C.F.R. §1003.31(c), the application is deemed waived or abandoned.

Respondent's application for asylum and withholding of removal was sworn before the asylum officer on January 23, 2003. The record shows that Respondent entered the United States on July 22, 2002. Therefore, the Court finds that Respondent's application for asylum is timely.

B. Asylum

1. Applicable Standards

INA § 208(a) provides that an alien may be granted asylum in the exercise of discretion if he qualifies as a refugee within the meaning of the INA § 101(a)(42)(A). An applicant for asylum "bears the burden of establishing that he or she meets the 'refugee' definition of INA § 101(a)(42)(A)," which defines a refugee in part as an alien who is unable or unwilling to return to his home country because of persecution, or a well-founded fear of persecution, on account of race, religion, nationality, membership in a particular social group, or political opinion. *Matter of S-P*, 21 I&N Dec. 486 (BIA 1996); *see also* 8 C.F.R. § 1208.13(a); INA § 208(a). The alien requesting asylum bears the evidentiary burden of proof and persuasion in connection with any application under section 208 of the Act. *See* 8 C.F.R. § 1208.136(a); *see also Matter of S-M-J*, 21 I&N Dec. 722 (BIA 1997); *Matter of Acosta*, 19 I&N Dec. 211, 215 (BIA 1985), *modified on other grounds, Matter of Mogharrabi*, 19 I&N Dec. 439, 446 (BIA 1987). The alien's fear of persecution must be country-wide. *Acosta*, 19 I&N Dec. at 235; *see also Matter of Fuentes*, 19 I&N Dec.

658 (BIA 1988). Additionally, the alien must establish that he is unable or unwilling to avail himself of the protection of the alien's country or nationality or last habitual residence. INA § 101(a)(42)(A). Finally, the alien must demonstrate that he is eligible for asylum as a matter of discretion. *See* INA § 208(b)(1); *see also INS v. Cardoza-Fonseca*, 480 U.S. 421, 423 (1987).

2. Credibility and Burden of Proof

In applications for asylum, withholding of removal, and withholding of removal under Article 3 of the Convention Against Torture, the Court generally makes a threshold determination of the alien's credibility. *See Matter of O-D*, 21 I&N Dec. 1079 (BIA 1998); *see also Matter of Pula*, 19 I&N Dec. 467 (BIA 1987); *Matter of Vigil*, 19 I&N Dec. 572 (BIA 1988). An applicant's own testimony is sufficient to meet his burden of proving his asylum claim if it is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis of his fear. *See Matter of Dass*, 20 I&N Dec. 120, 124 (BIA 1989); see also 8 C.F.R. § 1208.13(a). An applicant may be given the "benefit of the doubt" if there is some ambiguity regarding an aspect of his asylum claim where credibility is not specifically called into question. *See Matter of Y-B-*, 21 I&N Dec. 1136 (BIA 1998). In assessing the application for asylum, inconsistent accounts create doubts regarding the alien's credibility. *See Matter of Mogharrabi*, 19 I&N Dec. 439, 446 (BIA 1987).

In some cases, an applicant may be found to be credible even if he has trouble remembering specific facts. *See e.g., Matter of B-*, 21 I&N Dec. 66 (BIA 1995) (finding that an alien who has fled persecution

may have trouble remembering exact dates when testifying, and such failure to provide precise dates may not be an indication of deception). However, testimony is not considered credible when it is inconsistent, contradictory with current country conditions, or inherently improbable or implausible. *See Matter of S-M-J-*, 21 I&N Dec. 722 (BIA 1997).

After a thorough examination of this record, this Court finds that Respondent has failed to meet his burden of proof. Respondent's claims are internally inconsistent, implausible and unsubstantiated by the record.

Significant discrepancies exist between Respondent's original and amended affidavits. For example, Respondent's second affidavit states that in 1992 "another officer attacked me in the head with the butt of his gun or some type of stick ... I fell to the ground and the officer kicked me all over my body. I was rolling around on the ground in pain, and there was blood everywhere due to a serious head wound I had suffered." *See* Exhibit 6, Tab B. Notably, Respondent's first affidavit does not contain any mention of such a serious injury. *See* Exhibit 3.

Respondent's account of his mistreatment is inconsistent with the information provided by Respondent's mother in her affidavit. For example, in his second affidavit, Respondent states that on June 7, 1990, "[a police officer] kicked me all over my body and beat me with the butt of his gun and a rubber baton in my head, chest, and back ... [h]e slammed the butt of his gun into my shins and trampled on my legs and feet with heavy boots." *See* Exhibit 6, Tab B. Respondent goes on to state that in 1992, "an officer beat me in the back with his baton, slapped me,

kicked me, and trampled on my feet." *See id.* Finally, Respondent indicates that the police attacked him again later that same year. *See id.* However, the affidavit of Respondent's mother indicates that Respondent's "first major beating" took place around April 11, 1997. *See* Exhibit 6, Tab L.

In addition to being inconsistent, Respondent's claims lack credibility. Notably, Respondent states in his second affidavit that he left his hiding place on June 7, 1990 to attend church and that, although he knew it was dangerous to do so, he subsequently walked home alone. *See* Exhibit 6, Tab B. This Court finds such a scenario highly improbable. Equally improbable is Respondent's contention that he spent two years evangelizing notwithstanding the fact that he was in hiding from authorities. This simply makes no sense. Similarly, Respondent's claim that he asked his mother to obtain an SCNC card and bring it to him while he was in hiding is highly implausible.

Respondent testified that he was able to proceed through the checkpoints at Douala airport without being stopped because he was with a family friend, Oumarou, a senior officer. However, Respondent failed to provide any evidence to corroborate this event.

Respondent presented affidavits from two medical professionals, Dr. Basch and Dr. Shu, attesting to physical injuries he suffered. In his first affidavit, Dr. Basch noted "[t]he presence of one testis in the scrotum with evidence of surgery on the scrotum and groin" and thus concluded that Respondent "did suffer the torture and abuse that he claims." *See* Exhibit 6, Tab I. In his second affidavit, however, Dr. Basch noted "[t]he presence of one testis in the

scrotum with evidence of trauma to the scrotum and groin." *See* Exhibit 10, Tab MMM. Dr. Basch was never presented for cross examination to reconcile this inconsistency.

Similarly, Dr. Shu's affidavit is of little evidentiary value to this Court. In his affidavit, Dr. Shu indicates that he saw Respondent "three times for assault." *See* Exhibit 6, Tab K. However, he does not speculate on how Respondent received his injuries. Additionally, Dr. Shu's affidavit is not notarized. Likewise, the medical certificate issued by Dr. Shu merely states that Respondent was "involved in repeated cases of assault." *See* Exhibit 6, Tab EE. Again, this document does not provide this Court with enough information for the Court to conclude that Respondent's injuries resulted from mistreatment he claims he received during detention. In addition, the medical certificate written on government letterhead is not authenticated pursuant to 8 C.F.R. § 287.6.

Although the record is replete with affidavits submitted on Respondent's behalf, none sufficiently corroborates his claims of arrest and mistreatment. For example, neither of Professor LeVine's two affidavits indicates that he has any firsthand knowledge of Respondent's experiences in Cameroon. *See* Exhibit 6, Tab C; *see also* Exhibit 10, Tab LLL. Similarly, Mr. Joseph Takougang's affidavit does not reflect any personal relationship with Respondent or firsthand knowledge of Respondent's alleged mistreatment in Cameroon. *See* Exhibit 6, Tab E. Likewise, the affidavit of Currie Burris is devoid of any details regarding the purported suffering that Respondent experienced in his home country. *See*

Exhibit 6, Tab M. Additionally, the affidavit of Mr. Mblingo Humphrey fails to mention any of the incidents of alleged abuse that Respondent suffered, notwithstanding Respondent's testimony that Mr. Humphrey visited him during the period of time he was in hiding. *See* Exhibit 3; *see also* Exhibit 6, Tab N. Finally, Respondent testified that his pastor in Mbengwi, David Tenge, obtained a passport on his behalf. However, the pastor's affidavit does not mention that he secured a passport on Respondent's behalf. *See* Exhibit 6, Tab HH.

Respondent also offered an affidavit from John Fomunyoh attesting to Respondent's membership in the SCNC North America. *See* Exhibit 3, *see also* Exhibit 6, Tab O. Because this affidavit does not provide any details as to the mistreatment Respondent suffered as a result of his SCNC activities in Cameroon, it, too, carries little evidentiary weight toward meeting Respondent's burden of proof. Likewise, the affidavit of Dr. Chiabi simply provides an overview of politics in Cameroon. It does not speak to Respondent's individual experiences or political activities. *See* Exhibit 8, Tab JJJ. As such, it does not provide this Court with sufficient information to conclude that Respondent was involved in the SCNC and that he was persecuted on that basis.

Additionally, Respondent states in his second affidavit that he was arrested in April 1997 and that he suffered terrible abuse during his detention. *See* Exhibit 6, Tab B. The affidavit indicates, "As I lay on the ground, naked, defenseless and weak from lack of food and water, they restrained me, beat the soles of my feet with their rubber batons, trampled on my

feet and legs, and kicked me in the back, head, abdomen, butt, and genitals." *See id.* The affidavit goes on to state, "I spent afternoons doing forced labor such as mopping, weeding, dusting tables and emptying trash." Respondent's claim that notwithstanding severe beatings every morning, he was able to perform forced labor every afternoon is highly implausible.

Respondent claims he suffered severe beatings in the mornings and forced labor in the afternoons during his September 1999 detention. He further claims that he was released from prison on October 9, 1999 by his uncle's friend, a warden, and that he escaped by running toward his mother and uncle, who were waiting with his uncle's car. Notably, the record does not contain an affidavit from Respondent's uncle to corroborate such a claim. Again, this Court finds it highly implausible that Respondent would be able to run away after being repeatedly mistreated over the course of more than 10 days. This simply makes no sense.

In her affidavit, Respondent's mother states, "On August 7, 2002, the police came to my house again and demanded Joseph. I answered that I did not know his whereabouts ... " *See* Exhibit 6, Tab L. This Court finds it highly improbable that Respondent's mother would refuse to tell the police about her son's hiding place (and suffer a beating as a result) when she simply could have told them that her son had already left for America. In her October 7, 2002 letter to Respondent, his mother states that will not disclose Respondent's whereabouts "even if I have to die for your sake." *See* Exhibit 3; *see also* Exhibit 6, Tab PP. Again, this Court finds it remarkable that

Respondent's mother would take such a stance at a time when Respondent was already safe in the United States.

Respondent has submitted a newspaper article regarding the arrest of an SCNC activist, Joseph Afonui, whom he claims to be. *See* Exhibit 6, Tab FF. However, Respondent spells his family name as Afanwi. Thus, there is nothing to connect the person in the article with Respondent.

3. Persecution

An applicant must also prove that there is a reasonable possibility that he might suffer persecution if returned to his native country. *See* 8 C.F.R. § 1208.13(b)(2)(i)(B). A well-founded fear of persecution must be both subjectively genuine and objectively reasonable. *See Cardoza-Fonseca*, 480 U.S. at 421.

A respondent must show some degree of likelihood that he may be persecuted. *Matter of Acosta*, 19 I&N at 226; *see also Cardoza-Fonseca*, 480 U.S. at 431. The BIA has interpreted "persecution" to include serious threats to an individual's life or freedom, or the infliction of significant harm on the applicant, as a means of punishing that person for holding a characteristic that the persecutor seeks to overcome. *Matter of Acosta*, 19 I&N at 233. *Cf. Klawitter v. INS*, 970 F.2d 149, 152 (6th Cir. 1992) (distinguishing between mere harassment and persecution); *Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir. 1993) (finding that persecution within the INA does not encompass all treatment that society regards as unfair, unjust, or even unlawful or unconstitutional); *Matter of Kasinga*, 21 I&N Dec. 357, 365 (BIA 1996) (discussing the level of harm

necessary to constitute persecution). Persecution must also be more than mere harassment. See *Mikhailevitch v. INS*, 146 F.3d 384, 390 (6th Cir. 1998). An applicant for asylum demonstrates a well-founded fear if he presents specific facts establishing that he has actually been the victim of persecution. *Cardoza-Fonseca*, 480 U.S. at 421; *Matter of Mogharrabi*, 19 I&N Dec. at 439. Evidence of past persecution raises a rebuttable presumption that an alien has reason to fear future persecution. *Matter of Chen*, 20 I&N Dec. 16 (BIA 1989); 8 C.F.R. § 1208.13(b)(1)(i). This presumption may be rebutted by proving by a preponderance of the evidence that conditions in the country have changed to such a degree that there is little likelihood of present persecution. *Matter of Chen*, 20 I&N Dec. at 18. Finally, persecution does not include discrimination, except in extraordinary cases. *See Bucur v. INS*, 109 F.3d 399, 402-03 (7th Cir. 1997).

Based on the totality of the evidence, this Court concludes that Respondent's claim of persecution is unsupported by the record. Respondent has not provided sufficient evidence to conclude that his fear of country-wide persecution in Cameroon is "reasonable." Respondent testified that he fears persecution based on his SCNC membership and subsequent detention and escape from prison in Cameroon. However, he has failed to provide sufficient documentary evidence to support his claim that he was arrested, harmed and that he escaped from prison and is now wanted by government authorities. Additionally, Respondent testified that he intended to return to Cameroon after his trip to the U.S. Such an intention, if true, would be inconsistent with that of a person fleeing for his life.

Respondent did not provide any testimonial or documentary evidence that the threat to his safety is country-wide. In fact, Respondent testified that he lived in Mbengwi for two years, during which time he worked, got married and started a family. As such, little credence can be given to Respondent's claim that he remains in danger. Therefore, this Court finds that Respondent has not met his burden of proof.

C. Withholding of Removal Under INA §241(b)(3)

Withholding of removal, in contrast to asylum, confers only the right not to be deported to a particular country rather than the right to remain in the United States. *See INS v. Aguirre-Aguirre*, 526 U.S. 415 (1999). To establish eligibility for withholding of removal, a respondent must show that there is a clear probability of persecution in the country designated for his removal on account of race, religion, nationality, membership in a particular social group, or political opinion. *See INS v. Stevic*, 467 U.S. 407 (1984). Such a showing requires that the respondent establish that it is more likely than not that he would be subject to persecution if returned to the country from which he seeks withholding of removal. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 423 (1987).

Respondent has failed to satisfy the reasonable fear standard required for asylum. Therefore, it follows that he has also failed to satisfy the clear probability standard for withholding of removal. *See INS v. Stevic*, 467 U.S. 407 (1984); *see also Matter of Y-B-*, 21 I&N Dec. 1136 (BIA 1998).

D. Withholding of Removal Under the Convention Against Torture

The applicant for withholding of removal under the Convention Against Torture bears the burden of proving that it is "more likely than not" that he would be tortured if removed to the proposed country of removal. *See* 8 C.F.R. § 1208.16(c)(2). "Torture" is defined in the treaty and at 8 C.F.R. § 1208.18(a)(1). In assessing whether the applicant has satisfied his burden of proof, the Court must consider all evidence relevant to the possibility of future torture, including: evidence of past torture inflicted upon the applicant; evidence that the applicant could relocate to a part of the country of removal where he is not likely to be tortured; evidence of gross, flagrant, or mass violations of human rights within the country of removal; or other relevant information of conditions in the country of removal. *See* 8 C.F.R. § 1208.16(c)(3).

In this particular case, the application for withholding of removal under the Convention Against Torture will be denied as Respondent has failed to show that it is "more likely than not" he would be tortured if removed to Cameroon. *See* 8 C.F.R. § 1208.16(c)(3). The Court reaches this conclusion for the reasons cited above in the denial of asylum.

E. Voluntary Departure

The Respondent is not statutorily eligible for the privilege of voluntary departure as he was not physically present in the U.S. for one year prior to service of the NTA. *See* INA § 240(B)(b)(1)(A).

V. Conclusion

This Court has found that Respondent has failed to meet his burden of proof with regard to his applications for asylum, withholding of removal pursuant to INA § 241(b)(3), and withholding of removal pursuant to Article 3 of the Convention Against Torture. Accordingly, such applications shall be denied. Additionally, because Respondent failed to show that he is statutorily eligible for voluntary departure, such relief shall be denied. An appropriate order is attached.

7/22/04
Date

/s/ Jill H. Dufresne
Jill H. Dufresne
United States
Immigration Judge
Baltimore, Maryland

Pertinent Statutory and Regulatory Provisions

8 U.S.C. § 1101(a)(42):

(a) As used in this chapter—

* * *

(42) The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or (B) in such special circumstances as the President after appropriate consultation (as defined in section 1157(e) of this title) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a wellfounded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term "refugee" does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion. For purposes of determinations under this chapter, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a

coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.

8 U.S.C. § 1158:

(a) Authority to apply for asylum

(1) In general

Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title.

* * *

(b) Conditions for granting asylum

(1) In general

(A) Eligibility

The Secretary of Homeland Security or the Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Secretary of Homeland Security or the Attorney General under this section if the Secretary of Homeland Security or the Attorney General

determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.

8 U.S.C. § 1231(b):

* * *

(b) Countries to which aliens may be removed

(3) Restriction on removal to a country where alien's life or freedom would be threatened

(A) In general

Notwithstanding paragraphs (1) and (2), the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.

* * *

8 U.S.C. § 1252:

(a) Applicable provisions

(1) General orders of removal

Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of Title 28, except as provided in subsection (b) of this section and except that the court may not order the taking of additional evidence under section 2347(c) of Title 28.

(2) Matters not subject to judicial review

* * *

(D) Judicial review of certain legal claims

Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

* * *

(4) Claims under the United Nations Convention

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of any cause or claim under the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment, except as provided in subsection (e) of this section.

(5) Exclusive means of review

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter, except as provided in subsection (e) of this section. For purposes of this chapter, in every provision that limits or eliminates judicial review or jurisdiction to review, the terms "judicial review" and "jurisdiction to review" include habeas corpus review

pursuant to section 2241 of Title 28, or any other habeas corpus provision, sections 1361 and 1651 of such title, and review pursuant to any other provision of law (statutory or nonstatutory).

* * *

8 C.F.R. § 1003.1:

(a)(1) Organization. There shall be in the Department of Justice a Board of Immigration Appeals, subject to the general supervision of the Director, Executive Office for Immigration Review (EOIR). The Board members shall be attorneys appointed by the Attorney General to act as the Attorney General's delegates in the cases that come before them. The Board shall consist of 15 members. A vacancy, or the absence or unavailability of a Board member, shall not impair the right of the remaining members to exercise all the powers of the Board.

* * *

(d) Powers of the Board—

(1) Generally. The Board shall function as an appellate body charged with the review of those administrative adjudications under the Act that the Attorney General may by regulation assign to it. The Board shall resolve the questions before it in a manner that is timely, impartial, and consistent with the Act and regulations. In addition, the Board, through precedent decisions, shall provide clear and uniform guidance to the Service, the immigration judges, and the general public on the proper interpretation and administration of the Act and its implementing regulations.

* * *

(3) Scope of review.

(i) The Board will not engage in de novo review of findings of fact determined by an immigration judge. Facts determined by the immigration judge, including findings as to the credibility of testimony, shall be reviewed only to determine whether the findings of the immigration judge are clearly erroneous.

(ii) The Board may review questions of law, discretion, and judgment and all other issues in appeals from decisions of immigration judges de novo.

* * *

8 C.F.R. § 1003.2:

(a) General. The Board may at any time reopen or reconsider on its own motion any case in which it has rendered a decision. A request to reopen or reconsider any case in which a decision has been made by the Board, which request is made by the Service, or by the party affected by the decision, must be in the form of a written motion to the Board. The decision to grant or deny a motion to reopen or reconsider is within the discretion of the Board, subject to the restrictions of this section. The Board has discretion to deny a motion to reopen even if the party moving has made out a prima facie case for relief.

* * *

(c) Motion to reopen.

(1) A motion to reopen proceedings shall state the new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits or other evidentiary material. A motion to

reopen proceedings for the purpose of submitting an application for relief must be accompanied by the appropriate application for relief and all supporting documentation. A motion to reopen proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if it appears that the alien's right to apply for such relief was fully explained to him or her and an opportunity to apply therefore was afforded at the former hearing, unless the relief is sought on the basis of circumstances that have arisen subsequent to the hearing. Subject to the other requirements and restrictions of this section, and notwithstanding the provisions in § 1001.1(p) of this chapter, a motion to reopen proceedings for consideration or further consideration of an application for relief under section 212(c) of the Act (8 U.S.C. 1182(c)) may be granted if the alien demonstrates that he or she was statutorily eligible for such relief prior to the entry of the administratively final order of deportation.

* * *

8 C.F.R. 1208.16:

* * *

(b) Eligibility for withholding of removal under section 241(b)(3) of the Act; burden of proof. The burden of proof is on the applicant for withholding of removal under section 241(b)(3) of the Act to establish that his or her life or freedom would be threatened in the proposed country of removal on

account of race, religion, nationality, membership in a particular social group, or political opinion. The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration. The evidence shall be evaluated as follows:

* * *

(c) Eligibility for withholding of removal under the Convention Against Torture.

(1) For purposes of regulations under Title II of the Act, "Convention Against Torture" shall refer to the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention, as implemented by section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998 (Pub.L. 105-277, 112 Stat. 2681, 2681-821). The definition of torture contained in § 1208.18(a) of this part shall govern all decisions made under regulations under Title II of the Act about the applicability of Article 3 of the Convention Against Torture.

(2) The burden of proof is on the applicant for withholding of removal under this paragraph to establish that it is more likely than not that he or she would be tortured if removed to the proposed country of removal. The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration.

(3) In assessing whether it is more likely than not that an applicant would be tortured in the proposed country of removal, all evidence relevant to the

possibility of future torture shall be considered, including, but not limited to:

(i) Evidence of past torture inflicted upon the applicant;

(ii) Evidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured;

(iii) Evidence of gross, flagrant or mass violations of human rights within the country of removal, where applicable; and

(iv) Other relevant information regarding conditions in the country of removal.

(4) In considering an application for withholding of removal under the Convention Against Torture, the immigration judge shall first determine whether the alien is more likely than not to be tortured in the country of removal. If the immigration judge determines that the alien is more likely than not to be tortured in the country of removal, the alien is entitled to protection under the Convention Against Torture. Protection under the Convention Against Torture will be granted either in the form of withholding of removal or in the form of deferral of removal. An alien entitled to such protection shall be granted withholding of removal unless the alien is subject to mandatory denial of withholding of removal under paragraphs (d)(2) or (d)(3) of this section. If an alien entitled to such protection is subject to mandatory denial of withholding of removal under paragraphs (d)(2) or (d)(3) of this section, the alien's removal shall be deferred under § 1208.17(a).

(d) Approval or denial of application—

(1) General. Subject to paragraphs (d)(2) and (d)(3) of this section, an application for withholding of deportation or removal to a country of proposed removal shall be granted if the applicant's eligibility for withholding is established pursuant to paragraphs (b) or (c) of this section.

* * *

Beatrice Fon
c/o Holy Family Health Center Akum
NW Province, Republic of Cameroon
October 22nd, 2003

Statement of Beatrice Fon

1. My name is Beatrice Fon and I am the mother of Joseph Afanwi who has applied for asylum in the United States of America. I live in Akum, Northwest Province, Republic of Cameroon, with Joseph's wife, Quinta Bin Tanda and their daughter Mildred Lum Afanwi. I am making this statement in support of Joseph's asylum application in America.

2. On several occasions, my son Joseph suffered serious injuries while in the custody of Cameroonian security forces because of his SCNC activities. As a nurse, I personally treated his wounds or took him to more appropriate medical facilities when necessary. I remember two particularly horrendous beatings well.

3. In the first major beating, on or around April 11, 1997, Joseph was seriously injured in the head and nose. The police had taken him from prison to Bamenda General Hospital, and when I came to see him, his head and nose were very bloody. Without the authorities' knowledge, I whisked Joseph away to the District Hospital in Mbengwi where he had to stay for a few days for recovery. I heard that he had lost his left scrotum because of the police beatings. Fearing reprisal from the authorities, after Joseph's

discharge from the hospital, he and I stayed in hiding in Mbengwi for a period of time.

4. In the other major beating, on or around October 8, 1999, my brother Tafor Fidelis told me that a friend of his, a Francophone police officer working at a police station where Joseph and other SCNC activists were imprisoned, had told him that they were to be transferred to Yaoundé. Tafor and I went to his friend's house to plead with and beg him to help Joseph escape because we feared we would otherwise never see him alive again. The friend agreed to help, but told us that as a prison escapee, the police would shoot Joseph on sight if spotted. So, thanks to our friend's assistance, Joseph miraculously escaped from the police station, and Joseph's church in Mbengwi helped him in hiding.

5. Since Joseph went into hiding after the second major beating, the police have come to my house in Akum at least twice. On one occasion, on or around March 24, 2002, they came to serve a summons "requesting" him to report to the Public Security Office in Kumbo on March 25, 2002. Because none of us were at home, they left the summon at the door.

6. On August 7, 2002, the police came to my house again and and demanded Joseph. I answered that I did not know his whereabouts because he had disappeared while I was with his wife Quinta in the hospital giving birth to their first daughter Mildred. The police officers kicked and beat Quinta and me even though Quinta had only recently been released from the hospital after Mildred's birth. I suffered an arm wound. The police then threatened to arrest and detain me until I disclosed Joseph's location. We were all hysterical. Fortunately my neighbours came

to intervene and pleaded with the officers to leave me alone because Quinta would not be able to take care of Mildred without me. The police finally let me go and left my house, but only after repeating their demand for Joseph and warning us of grave consequences. Because we were very afraid of another police search and harassment, Quinta, Mildred and I went into hiding in Bafut and then stayed with a friend in Akum. Although we are back at our home nowadays, we still fear the police constantly.

7. I worry about and pray for Joseph everyday. I am glad to know that he is safe in America. I pray that his asylum application will be granted soon. Although I badly miss my son and long to see him here in Cameroon, I want him to remain safe and healthy more than anything else. May God be gracious to him and his family and allow them to live in America together.

8. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed in Akum, North West Province, Republic of Cameroon, on

October 23rd, 2003

/s/ Beatrice Fon 23-10-2003

Beatrice Fon

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
U.S. IMMIGRATION COURT
BALTIMORE, MD

IN THE MATTER OF	)	**File No. A96-269-753**
	)	
AFANWI, Joseph	)	**In Removal**
	)	**Proceedings**
RESPONDENT	)	

AFFIDAVIT OF JOSEPH AFANWI

1. My full name is Joseph Afanwi. I am applying for asylum because the police in my country, Cameroon, beat and tortured me because of my belief in independence for Southern Cameroons and my involvement with the Southern Cameroons National Council ("SCNC"). I was attacked by police officers several times because of my beliefs. I was also imprisoned and tortured twice. Many of my injuries required hospitalization. Because I was afraid I would be killed, I left my family and went into hiding for almost three years in rural Cameroon. I eventually escaped Cameroon when the police began to crack down again on SCNC members and fled to the United States. I fear returning to Cameroon because I believe I will be shot on sight or imprisoned and severely tortured.

2. I am a native of Bafut Village in the North West Province of the Republic of Cameroon. I am a citizen of Cameroon and lived there my entire life before coming to the United States. I was born on November 22, 1971 to Joseph Angwafor and Beatrice Angwafor. My father was a police officer and my mother still is a nurse. My father committed suicide when I was just a baby, so I do not remember him. My mother got remarried and had three more children with my stepfather Luke Fon, a teacher. I have a stepbrother Alfonse Fon, and two stepsisters - Seraphine Fon and Precillia Fon. They are all students. My mother and stepfather divorced, although my mother still goes by Beatrice Fon. My stepfather is deceased.

3. I graduated from a Catholic primary school in Bamenda in 1984. I graduated from a secondary school in Mbengwi in 1990. Before my secondary school graduation, in 1988, I converted from Catholicism and joined the Presbyterian Church. The Presbyterian Church attracted me because of its emphasis on reading the Bible and going out in the community to evangelize. My religion and my faith in God are guiding forces in my life. I have always been active with the Church. In Cameroon, I was an evangelist. Here in the United States I am a member of the Silver Spring Presbyterian Church.

4. On May 26, 1990, the Social Democratic Front ("SDF") was launched in Bamenda. The founders of the SDF wanted an opposition party to the regime of Paul Biya. I became very excited and hopeful about the changes that the SDF might bring about, so I attended the launch rally on May 26 with thousands of others. I participated by marching and chanting. It

was a very exciting day. During the launch, which was supposed to be peaceful, there was a large-scale confrontation between unarmed civilians and armed security officers in helmets and other gear. The police shot six civilians to death and wounded many others. The officers used a water cannon with tainted water to disperse the crowds. The police beat and arrested many civilians. The police shot my friend Gerald Forbin in the leg and he had to have his leg amputated. Paul Biya declared a state of emergency for Bamenda. During this state of emergency, the police harassed, arrested and tortured those who had participated in the May 26 launch. They also randomly raped many innocent girls and women, including my mother.

5. I went into hiding after the SDF launch with a friend, Fusi Paius, at his home in Nkwen because I feared the police would be looking for me. We stayed indoors all the time except on quiet days when we went out for church so that we could pray for peace. When we heard troops in the quarter, we hid in the ceiling. My mother would bring us food and it was during one of her visits that she told me of her rape.

6. On June 7, 1990, while still in hiding, I attended a church service at the Presbyterian Church in Ntamulung Quarter, Bamenda. I knew it was dangerous to leave the house, but my church was too important to me to give up. I walked home alone and was about five minutes from the church when a black police truck pulled up beside me. I could see about twenty police officers on the truck, all armed with guns. There were rumors that there had been cameras at the rally and the police were now looking

to crack down on the people they knew had attended. I felt sure they knew I had been at the rally, so I panicked and ran. I was afraid to be arrested because so many people are tortured in prison. An officer jumped off the truck and chased me. I was scared that he was going to shoot me in the back as I ran. When he caught up with me in the bushes, he kicked me all over my body and beat me with the butt of his gun and a rubber baton in my head, chest, and back. He forced my shoes off and beat the soles of my feet with his baton while he held me on the ground. The officer also slammed the butt of his gun into my shins and trampled on my legs and feet with his heavy boots. I felt sure he was not going to stop until I was dead. He finally left me lying in the bushes. I woke up in the bushes later that afternoon covered with mud and feeling very cold. I dragged myself home although I was in horrible pain. I carried my shoes because I could not even put them back onto my feet. My mother was upset, but she cut my muddy clothing off of me and took care of me. I spent the night at home, but the next day my mother took me to the District Health Center in Mbengwi. My mother is a nurse and she worried about internal bleeding. Dr. Shu, the only resident doctor at the hospital, treated me. My feet swelled and bruised and I felt severe pain all throughout my body. I remained in the hospital for two days.

7. In 1992, Cameroon held its first multi-party democratic presidential elections. The SDF, led by Chairman Ni John Fru Ndi, should have won the election, but Paul Biya's political party, the Cameroon People's Democratic Movement, rigged the election in Paul Biya's favor. Well-reputed

organizations like the Washington, D.C.-based National Democratic Institute declared that the election was not free and fair. Despite this, Paul Biya shamelessly installed himself as the president of Cameroon. Many angry Cameroonians staged a series of civil disobedient demonstrations in November of 1992 to protest the rigged election. I actively participated in the Bamenda protests by carrying placards and leading a group of demonstrators as we chanted anti-government slogans. The police took me into custody and forced me to sit in the road with others they had also detained. The police questioned why we were on the streets demonstrating and beat the seated crowd. An officer beat me in the back with his baton, slapped me, kicked me, and trampled on my feet. I was terrified that I would be taken to prison - I had heard horrible stories about people being starved, tortured, and killed in prison. I was also scared because I had heard stories about people losing their eyesight after the police detained them in the dark for long periods of time. When the officer was later distracted, I snuck away, crawling, and crawled into a woman's kitchen nearby. She took pity on me and gave me water to drink and wash my face, and gave me money to take a taxi home.

8. Later that same month, I walked through Finance Junction in Nkwen and saw twenty or thirty people seated in the road, outnumbered by police officers. The officers were stopping pedestrians and cars and trying to intimidate the population. I was scared to keep walking through the Junction, but I did not want to look suspicious by turning around or running. The officers had guns, so I especially did not

want to run from them. One of the officers stopped me and asked for my ID card. I was nervous because I did not know exactly what the police wanted with me, and I was afraid they would recognize me. I gave my ID to the officer and he walked across the road with it. Another officer attacked me in the head with the butt of his gun or some type of stick - I did not see what he hit me with. I fell to the ground and the officer kicked me all over my body. I was rolling around on the ground in pain, and there was blood everywhere due to a serious head wound I had suffered. The guard who attacked me laughed and insulted me with the remark that my blood was only water, and that I could just drink more water to replenish it. I was afraid that I was going to die from the loss of blood. A different officer saw all the blood and escorted me to a nearby clinic, but it was closed, so he gave me back my ID and told me that was all he could do. Then he left me there and walked away. I had to walk home alone and treat the wound myself with iodine and bandages. I had to shave my head because the wound was so bad.

9. In April 1993, I attended the All Anglophone Conference ("AAC1") held at Mt. Mary Catholic Maternity Hall in Buea, South West Province, organized by the All Anglophone Movement. I lived in Yaoundé at the time, so I traveled to Buea by bus. At the conference, I distributed conference papers, ushered attendees, and helped to form a human shield around the conference leaders. Anglophones who wanted Paul Biya to begin a dialog with them called for a return to the 1961 federal structure of Cameroon within a certain timeframe.

10. On May 1, 1994, I attended the Second All Anglophone Conference ("AAC2") organized by the All Anglophone Movement and held at Big Mankon Catholic Primary School in Bamenda. The purpose of the conference was to call for the independence of Southern Cameroons because the Biya regime had ignored the call at AAC1 for a return to the legitimate 1961 federal structure. I participated by arranging the facility, distributing conference papers, and escorting and protecting leaders. The Southern Cameroons National Council ("SCNC") was officially formed at AAC2. I did not officially join the SCNC at that time because I had not yet felt the calling to join. However, I sympathized strongly with the cause and participated in SCNC activities and demonstrations.

11. As a result of my SCNC affiliation, the police harassed me on numerous occasions. One time, police stopped the bus I was traveling in from Yaoundé to Bamenda, and singled me out of all the passengers. They called me off the bus and took my ID card. The officers interrogated me about my identity - they wanted to know if I was really Joseph Afanwi, as my ID said. They asked where I was coming from, where I was going to, and why. They ordered the bus to leave without me and forced me to wait for the next bus. On another occasion, the police stopped the taxi I was in with four or five others. Once again, they singled me out and made me get out of the taxi. They took my ID, interrogated me, and told the taxi to leave. I was terrified that I would be arrested. However, they just harassed and delayed me with their questions. I had to wait for another taxi.

12. I also suffered discrimination because of my association with the SCNC. There are no private employment opportunities in the Anglophone provinces of Cameroon, so I had no choice but to work for the government. Still, I could not get a government job. After my high school graduation, I applied to be a government teacher but the government denied my application. I needed money to support my family, so I applied to the military. When I submitted the application, a government official told me to go ask the SCNC for a job. Again, the government denied my application despite my having received strong physical and medical test scores. I knew I had strong scores because there was an Anglophone member on the jury that gave out government jobs, and rumors got back to me that I had good scores. The discrimination depressed me because I had an education but still might never have the opportunity to work and support my family.

13. Because I could not work, I instead chose to attend the University of Yaoundé. It was difficult to be admitted to the University, as the Admission Board would only speak to applicants in French, and my French was very limited at that time. My mother paid my tuition and I majored in history. It took me five years to earn my B.A. because so few classes were offered in English. I ended up having to take several courses in French even though French is not my native language. I studied with Dr. Emmanuel Chiabi, an Anglophone history professor who taught me more about the Francophone government's betrayal of the promises made at the time of Cameroonian independence. As part of Dr. Chiabi's class, I wrote a paper on John Ngu Foncha, an

Anglophone secessionist and the Anglophone former Prime Minister of West Cameroon, the Anglophone state under the defunct federal structure. I visited Mr. Foncha at his home in Bamenda and talked to him about the Anglophone situation. My knowledge of the Anglophone experience in Cameroon grew, as did my commitment to the SCNC.

14. I founded and served as Coordinator for the Civil Rights Empowerment Group ("CREG") in the village of Akum. CREG was an organization of high school and university students and graduates that educated youths about their civil rights. On May 19, 1994, I organized a rally at Akum Market Square to urge the youths to boycott the May 20 government activities that marked the day of our enslavement. It was a day of enslavement because it was the day the Francophones annexed Anglophone Southern Cameroons, leaving Anglophones without their freedom. I left the rally alone but realized that three police officers were following me. They tried to act as if they were not following me, as if they were just strangers. They caught up with me and one of them said something in French. I did not quite understand. All three of the officers began to beat me on the head, face, and elsewhere on my body. My head and nose bled profusely. I tried to fight back but I was outnumbered. I felt sure that this time around they would beat me to death and abandon my corpse on the road. The officers warned me to stop organizing rallies and left. I lay on the ground for a while and then walked home. My mother worried that I might have internal bleeding, so she took me to the doctor in Mbengwi.

15. By early 1997, I had grown to suspect that I was being watched and monitored by the Biya regime. I had been meeting regularly with other SCNC leaders and felt certain I had been seen by the police. Fellow SCNC leaders told me horrible stories of what happened to activists in prison. I wanted to have my name in the SCNC records in case anything happened to me. Thus, I realized my dangerous situation and felt the calling to officially join the SCNC. I paid 500 francs for my membership card at the office of the SCNC secretariat in Bamenda. I officially joined as a Youth League member and became Youth Coordinator for Akum Village. As Youth Coordinator, I organized rallies under the supervision of the Northern Zone Chairman, Mbinglo H. Humphrey. We had monthly meetings with the SCNC executives. Mr. Humphrey gave me agendas for meetings and I debriefed Mr. Humphrey when meetings ended.

16. On March 28, 1997, a group of armed civilians attacked the Bafut, Kumbo and Bamenda police stations in the North West Province. The SCNC had nothing to do with these attacks. However, the Biya regime blamed the SCNC because the regime felt threatened by the SCNC and used the attacks as a pretext to punish SCNC members.

17. On April 5, 1997, I was home for Easter break. At this time, I was a part-time student at the University of Yaoundé and traveled regularly between Akum and Yaoundé. Around six o'clock in the morning, I heard a knock on the door of my mother's house. We had all been sleeping, but I went to answer the door. I opened the door to find four Francophone police

officers who entered the house and told me I was under arrest. They brandished a warrant but I did not have enough time to read it. I asked why I was being arrested but the officers would not answer me. They handcuffed me and kicked and slapped me. My screaming woke my mother and cousin who rushed into the room. One of the officers slapped my mother and forced her to sit on the floor, telling her to be quiet. My cousin was also forced to sit on the floor. The officers searched the house and took my SCNC membership card and other SCNC-related materials such as tracts and letters from the Northern Zone Chairman. They took me outside and sandwiched me in the back seat of a taxi between two officers, with the other two in the front seat. They drove me to Old Town Bamenda Public Security Police Station. I was terrified about going to prison and about what the police were going to do to me there. In the general office, they registered my name, my address, and the names of my parents. While I remained helpless and handcuffed, the officers beat me in the general office. They kicked me in the head and stomach, trampled on my legs and feet with heavy boots, and beat the soles of my feet. They removed my handcuffs and forced me to strip naked. I felt terrified because I thought for sure they were going to kill me.

18. The officers took me to a narrow cement cell with three walls and an iron gate. The cell was very dirty and dark and had no bed or blankets. All that was in the cell was a dirty bucket for excrement. The police beat me again in the cell. I slept on the floor although it was very cold at night. The next morning, an officer called me out for interrogation. He took me alone to another room where a single officer waited. The

officer asked me if I knew why I had been arrested. I said no and he laughed and told me they had arrested me because of my involvement with the SCNC. He asked me where I was on March 28 and March 29. I responded that I had been in Yaoundé. He asked why I had been in Yaoundé and I told him that I attended the University of Yaoundé. He asked me many other questions that I do not remember. I only remember being terrified that once they got answers to their questions, they would kill me. The officer forced me to promise that I would no longer participate in the SCNC if I were released. I promised because I had no other choice. After the interrogation, an officer took me to another room and gave me small amounts of bread, water and rice. I had gone over twenty-four hours without food or water. They took me back to my cell.

19. Every morning the guards would conduct what they called "morning cafe," or morning coffee. As I lay on the ground naked, defenseless and weak from lack of food and water, they restrained me, beat the soles of my feet with their rubber batons, trampled on my feet and legs, and kicked me in the back, head, abdomen, butt, and genitals. They hit me in the head, legs, and on the rest of my body with the butts of their guns. After beating the soles of my feet, they forced me to walk and jump on sharp gravel while singing anti-SCNC songs as they watched and laughed. I was naked this entire time. Whenever they did these things to me, I tried to tell myself it was just a dream, and that afterwards everything would be okay. I spent afternoons doing forced labor such as mopping, weeding, dusting tables, and emptying trash. They gave me only small daily rations of food

and water. When I was not doing chores, I spent the time alone in my cell. I often heard screaming from the direction of the general office. I tried to stay hopeful but feared every day that I would be killed or disappear. I prayed a lot – God was my only consolation. I prayed for his will to be done in my life. I thought about the Old Testament's Book of Ecclesiastes, Chapter Three, which says there is a time for everything, including death. I also recalled The Book of Psalms, Psalm 23 - "The Lord is my Shepard, there is nothing I lack."

20. On April 10, 1997, the police beat me so badly that I lost consciousness. I awoke on the morning of April 11 in the Bamenda Provincial Hospital. The police had abandoned me there, I think to die. I felt very sick and my testicles were so swollen that I could not walk or stand up straight. My mother arrived by taxi and took me to the Mbengwi Health Center. We left Bamenda because I was scared that the police would come back to check on me. I permanently lost one of my testicles as a result of the beatings I suffered. Losing my testicle was a horrible experience because I worried that I would never bear children and have a family. I was in the hospital from April 11 until April 15. At the end of April I returned to Yaoundé but stayed very low-key because I felt the presence of the government everywhere I went. When I did go to Akum, I traveled at night or in the early morning.

21. Despite the torture I suffered in prison, I did not end my SCNC activism because I believed then, and still believe, that the greatest encouragement is awareness. As soon as I was no longer ignorant about

the marginalization of Anglophones, I could not just stand by and do nothing. The conviction and desire to bring about change were a part of who I was. I was willing to sacrifice for the cause of Anglophone independence. I knew that my sacrifice would benefit others, and that if I were not the one to sacrifice, someone else would sacrifice in my place.

22. On September 27, 1999, I chaired a Southern Cameroons Youth League meeting at Akum Government Primary School Hall in Akum. There were nineteen other attendees, including Charlie Mukom, the Secretary of the Youth League in Akum, and John Akuroh, the Vice President of the Youth League in Akum. Around five o'clock in the evening, while I was at the pulpit talking to the crowd, approximately five police officers entered and others surrounded the building. The officers ordered the meeting to end and confiscated all of our SCNC papers. One officer spoke into his hand held radio and a black police truck arrived. The officers ordered all twenty of us onto the truck. We had to get on because there was no way to escape. The police took us to Bamenda Provincial Public Security Headquarters. They never told us why we were being arrested nor did they show us a warrant.

23. The police registered our names then separated the men from the women. There were eleven women and nine men. They forced us to strip naked and then beat us. I was kicked allover my body and beaten on the soles of my feet. Then I was put into a small, dark cell with the other eight men. The only thing in the cell was a bucket. The officers threw cold water on our naked bodies and the floor of the cell to prevent

us from sleeping. On the second day, all nine of us stayed in the cell all day. They did not give us any food or water that entire day. On the third day, they took us out of the cell one-by-one for interrogation. They took me first because they believed I was the group leader, as I had been speaking at the pulpit when they arrived at the meeting. The senior officer interrogated me in English. He wanted to know my name, where I was arrested, if I knew why I was arrested, what the purpose of the meeting was, what we were doing at the meeting, who organized the meeting, and other questions that I do not remember. I cooperated because I felt I had to, since the police had confiscated SCNC materials from us at the meeting. After the interrogation, which lasted about an hour, they finally gave me rice, dry bread and water for the first time in two days.

24. On many mornings, the police officers beat me as part of morning cafe. Because the police believed I was the group leader, they beat me longer and more often. I also did forced labor as I did during my last imprisonment. On about the tenth day of my imprisonment, a guard taunted and terrorized us with the news that they planned to transfer us to Nkondengue Maximum Security Prison in Yaoundé. After hearing this, I feared I might never see or hear from my family again. I also feared that if I were killed, my remains might never been returned to my family, as happened to so many others. SCNC leaders had told me of the reputation of Nkondengue and told me stories about people just disappearing at Nkondengue, or being killed in transit, or being starved to death. I felt panicked and trembled a lot.

All I could do was pray and depend upon the Lord to use me for His purpose.

25. A friend of my uncle's was a prison guard. My mother told me later that he warned my uncle, Tafor Fidelis, about the pending transfer. After learning of the pending transfer from my uncle, my mother made a desperate and dangerous attempt to save my life. She and my uncle went to the guard's home, where my mother wept and begged him to spare her son. Because he was a family friend, the officer agreed to help. The guard told her that he would let me escape and would write a falsified report. But he warned my mother that if I were ever seen by the police I would be shot on sight as a prison escapee. Around 3:30 in the morning on October 9, 1999, the guard called me out of my cell and told me to run in a certain direction. I ran but thought I was going to be shot in the back. However, as I was running, I heard my mother's voice from the darkness. I ran toward her voice and found my mother and uncle waiting with my uncle's Toyota Camry. We drove that night to Mbengwi while I hid on the floor of the car.

26. My mother and uncle took me to live in hiding at the Presbyterian Mission in Mbengwi, in the interior of Bamenda. It was about an hour's drive, on rural dirt roads. My uncle chose the church as my hiding spot because Mbengwi is very rural and the police would have no reason to look for me there. Also, I had been active at the Mbengwi Mission when I attended high school in Mbengwi. While I was in hiding, I stayed indoors during the day. I lived with Pastor David Tende in his home on the Mission grounds.

Only the pastor and the church session (elders), of which there were ten members, knew I was in hiding.

27. I stopped participating in SCNC activities out of fear. Instead, Pastor David Tende trained me to evangelize. He taught me to read and interpret the Bible, to write sermons, and to preach. I dedicated my life to God. For two years I traveled occasionally at night with Pastor Tende to evangelize. I knew it was risky to leave the Mission but I felt called by God to deliver his teachings. Pastor Tende and I went to very remote locations and villages, where no one would know me. I was known as Evangelist Joseph - my last name was never given. The pastor and I would travel by car as far as we could and then get out and walk when the roads ended. We went to remote enclave areas such as Mbomi and Acha and only preached to ten or fifteen people at a time via interpreters.

28. In October of 2001, the police hunt for me and other SCNC leaders intensified. This occurred after the October 1, 2001 demonstrations for the fortieth Independence Day for Southern Cameroons. I obviously did not attend, but later heard that three peaceful Southern Cameroonian demonstrators were killed and over one hundred arrested. These demonstrations angered the Biya regime, and the police began to crack down once again on SCNC members and leaders.

29. On February 25, 2002, I married Quinta Bih Tanda in Andek-Ngie. We had known each other for a long time, as she is also from the Bafut tribe. The

wedding was extremely small, with only a few witnesses. We felt safe marrying there because it was such a remote location. I also wanted to get married because it was important to me and because I loved my wife deeply. Our marriage was a sign of our commitment and love for each other. After our wedding day, I returned to hiding in Mbengwi while my wife continued her studies in Ngie.

30. Around March 25, 2002, the police left a summons at the home of my mother. This summons scared me because I knew that the police really were looking for me.

31. The October 2001 crack-down and the police summons scared me and I began to formulate a plan to flee to Nigeria. The church suggested I go to the United States instead because Cameroonian security forces were known to cross the Nigerian border to look for dissidents and escapees. As an opportunity to escape, the church selected me to represent the church at a conference in Montreat, North Carolina. The Silver Spring Presbyterian Church paid for my flight to the United States. Pastor David Tende got me my passport. He brought me the passport and I signed it where the plastic cover had been cut away. On July 15, 2002, I traveled to Yaoundé at night. On July 16, I had an interview with a U.S. consular officer. I was truthful with the officer about my intent to return to Cameroon because at that point I did not know about asylum and did not think I would be staying in the United States for longer than six months. I received a six-month B-1/B-2 visa from the U.S. Embassy and returned to Mbengwi that same day.

32. My family contacted a family friend, a police commissioner named Oumarou who worked at Douala International Airport to ask for his help in getting me through the airport security checkpoints. On July 20, I traveled to Douala International Airport. Oumarou escorted me through all five checkpoints to my departure gate. Because I was with a senior officer, no one stopped me or asked me any questions. I took Air France flight #843 to Charles de Gaulle International Airport in Paris, France. In Paris, I transferred to Air France flight #28 to Dulles International Airport. I had no contact with French immigration or customs authorities since I was only in France for a few hours as a transit passenger. I arrived in Washington, D.C. on July 22, 2002. I was admitted into the United States as a B-2 visitor until January 21, 2003.

33. I spent my first night in the United States at the Silver Spring Presbyterian Church. The next day we drove to and attended the conference in Montreat, North Carolina from July 23 through July 27. We returned to Silver Spring on the evening of July 27. It was a very long drive. I stayed at the Church when we returned to Silver Spring and the Church ultimately invited me to stay until January 21, 2003. The Church and I both thought I was staying for six months. I still intended to return to Cameroon when the six months had passed. I hoped that the situation in my country would calm down by that time, as things are always up and down. I consider the people at my Church to be my family. I have an especially close relationship with my pastor, Currie Burris. We talk and pray together often. I have not worked in the United States. Instead, I have only helped people in

need by doing small chores like cleaning, raking leaves, mowing lawns and shoveling snow. Though I have received tips from these chores, I am primarily supported by the church and members of the congregation.

34. On July 28, 2002, my daughter Mildred was born in Akum. I have never seen her and she has never seen her father. I left Cameroon only a week before her birth because my family and I felt I could not pass up the opportunity to get out of danger for a while. I love my wife and daughter very much and miss them all the time.

35. On August 2, 2002, very soon after my arrival in the United States, I joined the North American chapter of the SCNC and began to participate actively in the organization. I joined because I was curious to see what the North American chapter was like and because I have such strong convictions that I will have to be a part of the SCNC no matter where in the world I am. There are about twenty or twenty-five others who attend bimonthly meetings with me. We meet in the Takoma Park public library and other public locations. The organization is funded by donations and organizes events such as protests outside the Cameroonian embassy here in Washington, D.C. The SCNC North America website even has a picture of me at one of the protests. I am worried that the Cameroonian government may know I am here in the United States if they have been monitoring the webpage. If they have, it is very likely they have listed my name with the airport police in case I try to return to Cameroon.

36. After my arrival in the United States, I learned that prominent SCNC leaders like Nfor Nfor, Chief Ayamba, and Enow John were arrested along with Albert Mukong, the leader of the Human Rights Defense Group. On October 28, 2002, I received a letter from my mother dated October 7 and postmarked October 8. In her letter, my mother told me that the situation at home was dangerous because the police were still actively looking for me. She told me that on August 7, 2002, police officers went to my mother's home searching for me. They asked my mother and wife where I was hiding. My mother told them that she did not know where I was, that I had disappeared while she was at the hospital with my wife giving birth to the baby. The police kicked my mother in the leg and she fell to the ground, receiving a wound on her arm. The police also hit my wife in the jaw. They wanted to arrest my mother until she revealed my hiding spot, but our neighbors intervened and convinced the police that my mother needed to be with my wife and newborn baby because they had just returned from the hospital and my wife could not manage on her own. The police told my mother that my family would not rest until police found and executed me. My wife and mother fled from Akum to Bafut in order to hide from the police.

37. I am very worried about the safety of my family. Every time I lay down, I worry about them. I have trouble sleeping, and when I do fall asleep I have nightmares about the tortures I suffered in prison. When I am awake, I miss my family terribly and worry that I may never see them again.

38. After receiving my mother's letter, I realized that the government meant business this time. I talked to friends at church, who told me about the possibility of asylum. My mother sent over all of my documents with a friend who was traveling to the United States.

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39. Since my escape from Cameroon, I have learned that the Southern Cameroons Youth League, because of a rogue leader, now advocates violence as an appropriate means to achieve independence. When I was a member of the League, it did not support the use of violence. I personally would never use violence or advocate its use as a part of the SCNC cause.

40. Although I had once hoped to return to Cameroon, I now know that I will not be able to return until there are changes in government or until Southern Cameroons has independence. I hope to start a new life here and remain active with the SCNC. I also hope to bring my wife and baby daughter over to the United States if I am granted asylum. They are my whole life and I miss them horribly. I would like to go into either nursing or go to seminary. I would also someday like to teach, especially Cameroonian history. If reform ever comes to Cameroon, I would contribute to rebuilding my country.

I hereby affirm, under penalty, that the foregoing is true and correct to the best of my knowledge, information, and belief.

/s/ Joseph Afanwi
Joseph Afanwi

10th-23rd-03
Date

Subscribed and sworn before me on October 23, 2003

/s/ Karen G. Bouton
Notary Public

Karen G. Bouton
Notary Public,
District of Columbia
My Commission Expires
December 14, 2005

THE UNITED STATES DEPARTMENT OF JUSTICE

IMMIGRATION AND NATURALIZATION SERVICE

ARLINGTON ASYLUM OFFICE

AFFIDAVIT OF JOSEPH AFANWI

I, Joseph Afanwi, I am a native of Bafut village in the North west province of the Republic of Cameroon. I was born on the 11/22/ 71, in Bafut of Mr Joseph Angwafor Wessi [deceased] and of Beatrice Angwafor. I have one brother[Alphonse] and two sisters [Precillia and Seraphine] All of them including my mother are in Cameroon. I am the first son of my mother, who later got married to another man after the death of my father, who then became my step father[Mr Fon Luke] -deceased.

I completed my primary school in Catholic School Bayelle Nkwen in Bamenda while I was with my Mum who worked as a nurse in the "Good Samaritan Polyclinic Nkwen Bamenda I attended my secondary and high school in Mbengwi where I obtained my General Certificate of Education and a High School Diploma respectfully in 1990 and 1993. There after, I went to the University of Yaounde 1, where I studied History and graduated with a first degree in 1999 As a history student I studied the history of my country-Africa and the world. I also learnt about the All Anglophone Conference, which was scheduled to take place in Buea in April 1993. I attended to learn more about the problems between the Northern and the

Southern fractions of my country.(Francophones and Aglophones [sic]). During this Conference, the Southern Cameroons National Council (S.C.N.C) was born. Another Anglophone Conference (AAC2) was scheduled in Bamenda in May 1994, which I attended as a sympathizer. I attended these Conferences and many others meetings to learn more about the history of the Anglophones. As a strong sympathizer, I participated in most of the activities of the (SCNC). The members of the SCNC yearned for democracy and used peaceful means to get the rights of the Anglophones from the Francophone ruling government.

Cameroon, a west African State was colonized in 1884 by the Germans. * * * [1]

Thus, in the wake of all these un just discrimination suffered by us the English Speaking Cameroonians, I decided to join the SCNC to contribute in redressing the plight of millions of Southern Cameroonians in demanding our Independence from the Republic of Cameroon. My support to the SDF originated from the fact that its leader had an English back ground with its objectives reflected on democratic values. For instance Cameroon was to be constitute in a four State federation with the English Speaking constituting one of them. It also stands for the separation of powers between the Executive, Legislature and the judiciary.

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[1] A lengthy discussion of Cameroonian history, geography, and socio-politics not specific to Mr. Afanwi is omitted.

On May 26th 1990 the main opposition party was launched in Cameroon, the Social Democratic Front [SDF], under the able leadership of its National Chairman Ni John Fru Ndi. I actively participated in its launching. This was totally against the wishes of the government of President Paul Biya, who deployed armed security officers all over Bamenda to prevent its launching. But because of our strong determination to bring about a meaningful change, defied the presence of these armed security officers and went ahead with the launching. Thereafter, a confrontation ensued between these armed security officers and the unarmed civilians, resulting to the death of six, shot and killed on the spot.

Many people were also wounded, others arrested, tortured and detained under horrible conditions in the Bamenda jails. Most of these detainees were later to be transferred to the Nkondengue Maximum Security prisons Yaounde. My involvements in the SDF was as a sympathizer. Just days after, a state of emergency was declared in Bamenda, followed by massive arrests targeting the participants of the May 26th launching by security officers as they went from house to house harassing, torturing and arresting the inhabitants. Several girls and women including my mother were raped and beaten.

On my way back from church in the afternoon on the 7th of June 1990, Sunday worship service at the Presbyterian church Ntamulung Bamenda, a black police truck pulled over and stopped beside me. I was afraid of what might happen, so I began running. One of the officers jumped out of the truck and began chasing me. Before long, he caught up with me in a

nearby farm. I ran into a nearby bush through a farm. He started to kick me and hit me with the butt of his gun; I fell to the ground pleading for my life. He took my shoes off. He was asking me questions in french, which I could not understand. He trampled on me with his boots, kicked me on the head and chest and beat the soles of my feet with a rubber baton he had. He rolled me in mud. I could not fight back or be rude to the officer because this would mean certain death. After what seems an eternity, he lift me in the bushes for dead. I must have passed out from the beatings and mud bath, because when I open my eyes again I was cold and covered with mud; I got up and slowly dragged myself home. My family helped me in the house; they had to cut my clothe from my body, bathe me and applied some home remedies until the next morning I was taken to the Doctor in Mbengwi for treatment. I was admitted to the hospital for two days.

In 1992, the first multi party democratic elections for President of the Republic of Cameroon were organized. The Social Democratic Front [S.D.F], the main opposition party in Cameroon led by its National Chairman Ni John Fru Ndi was the winner. But Mr Biya's Cameroun Peoples Democratic Movement [C.P.D.M] rigged the election results in his favor. These elections were supervised by some international organizations including the Washington D.C. based National Democratic Institute [N.D.I]. These reputed organizations declared the elections were not free and fair. Even with all these protests of the elections Mr Biya shamelessly went ahead and installed him self as the president of Cameroon. This sparked off a series of

civil disobedient demonstrations in November 1992 by members and supporters of the S.D.F. party in protest allover Cameroon. I actively participated in the Bamenda civil disobedient protests. Carrying placards and leading a group of demonstrators, chanting anti government slogans. In response to these protests the government deployed the gendarme security officers who confronted, dispersed, arrested and brutally tortured us with the use of anti riot weapons. I was arrested and beaten allover my body and the soles of my feet with a baton. I cried in agony as it hurt so much. After hours torturing and questioning I was able to escape. I crawled along the road until I ended up in a woman's kitchen. I explained my situation to her and she sympathized offering me water to drink, washed my face and money to take a taxi home. I was administered home remedies by my mum.

On the April 2nd and 3rd 1993 the Southern Cameroons National Council [S.C.N.C] was formed, at the All Anglophone Conference [AAC 1] in Buea, in the South west province of Cameroon. This nationalist liberation movement was formed to check the gearing tides of annexation and assimilation of Southern Cameroonains [sic] by The Republic of Cameroon. This Conference was held at the Mount Mary Catholic Maternity Hall, for the government refused the use of its facilities. At this Conference, I actively participated in sharing conference papers to its participants, ushering its participants into the hall. Others and I formed a human shield around our leaders protecting and escorting them in and out side the hall from possible being harmed by heavily deployed security officers around the conference

center. At the end of the conference, it resolved on a call to the return of the two State Federation of 1961 by The Republic of Cameroon. After this call was ignored with impunity by The Republic of Cameroon, another All Anglophone Conference [AAC2] was held on May 1st 1994 at the Big Mankon Catholic primary school hall Bamenda. Here I also participated in arranging of the hall, serving Conference papers to participants and together with other healthy guys escorted and protected our leaders from harm. This Conference resolved that, it will revive its independence if the Republic of Cameroon continues to ignore a return to the 1961 two state Federation.

Because of my connection with the SCNC, I was constantly harassed and tortured by the Bamenda police security officers. I was discriminated against in every way possible including employment. When I applied for military recruitment after I left high school, I was discriminated against even though I did well in the physical and medical tests. I was told by one of the French speaking recruiting officers that I should go ask the SCNC for employment.

The (CREG) is an association of High school and University alumni, of which I was the leader. On May 19th 1994 at about 2.00pm, I organized a public rally at the Akum Market Square. The purpose of the rally was to educate the village youths about their civil rights .Through door to door campaign, the pasting of flyers and the tracks. We opened the rally with prayers. I began to explain to the gathering the meaning of the so- called May 20th National day for the Southern Cameroons, castigating its essence and asked them to boycott it.

I explained that it was on May 20th 1972 that the Francophone led government annexed Southern Cameroons, under the pretext of uniting the then two federated states, established in 1961 to minimize the cost of running four houses of assembly. Which were the then Eastern Cameroon house of assembly, the Southern Cameroons house of assembly, the Southern Cameroons house of chiefs and the federal house of assembly. Thus, the celebration of this day will be tantamount to slaves celebrating their enslavement. This rally lasted two hours. On my way home, I noticed that three men were following me. I thought they were thieves; so I hasten my pace. Eventually they stopped me and behaved like strangers at first. When they came close to me, one said something in French and they started assaulting me. I fought back in self-defense, but was over powered by them for one hit me so hard on the head, I started bleeding from my head and nostrils. When they realized I was bleeding they told me they were police security officers warning me to stop organizing such rallies, then left. Some passers-by assisted me to stop bleeding. When I returned home full of pain; my family feared that I had internal bleeding, I was taken to the doctor.

I officially joined the SCNC in 1997, as a Youth League member.[see attached:[Testimony on Joseph Afanwi, from chairman Northern Zone] On April 5th 1997, I was arrested and detained by four police officers from our house. It was about 6:00am when I heard a knock on the door at our Akum-Bamenda residence. When I opened the door, they told me I was under arrest. When I tried to ask why? They

showed me an arrest warrant, they hand cuffed my hands behind me, then they slapped and kicked me, I screamed out in agony for help. This noise woke my family who rushed to the living room. Unfortunately they could not help as these officers victimized them too. Our house was also searched and in this process they found my S.C.N.C membership card and other SCNC related materials, which they took with them. I was sandwiched between two officers at the back seat of a Taxi and transported to the public security police station, Old Town Bamenda, where I was detained for five days.

When I arrived the police station, one of the officers registered my name and other information related to me. I was kicked several times in the abdomen, stomach and head as I lay on the filthy floor screaming in pain with my hands still hand cuffed behind me. The soles of my feet were beaten with a rubber baton and another officer trampled on them. I screamed even louder as it hurts. After the beatings I was jailed alone in a small dark stinky cell. The cell had three walls and a solid iron gate.

Nothing was found in the cell but for a stinking bucket for toilet. While in the cell, I was full of sharp excruciating pain, in my stomach as I lay on the filthy floor. Over the night I defecated and urinated in the bucket and stayed with all night. The next morning I was taken out of my cell to another officer for interrogation. The officer asked me why I was arrested? I said I do not know. He laughed telling me that, I was arrested because of my involvement in the SCNC which they hold responsible for carrying out terrorists activities at the Bafut and Kumbo police

stations, and parts of the North West province of Cameroon. It was then, that I knew the reason why I was arrested. I told the officer that I did not know any thing about the terrorists' acts. He then asked me to promise him abstaining from this group after my release. I did, in order to be released. Then he took me into a hall where I was served bread, boiled rice and oil. I was given boiled rice and water only once daily. Every morning, I was escorted by an armed officer to take my bucket to be emptied behind the police office, then I was beaten on the soles of my feet and forced to sing anti SCNC slogans, while walking on sharp gravel in the front of the police office. No relatives or friends were allowed to visit me.

On the 10th of April, the pain inflicted in my stomach, by the police beatings, the inhumane sleeping/eating conditions and psychological torments made me gravely sick. I was really sick my right testicle got swollen until I could not stand up straight. Despite the fact that I was sick, the beatings continued. They beat me until I became unconscious. I woke up one morning in be at the Bamenda Provincial Hospital. Roumours [sic] got to my family and my mother came with a hired taxi and transferred me to the Mbengwi Health center at the interior of Bamenda where I was admitted for treatment. As a result of the police mistreatment, I lost my testicles[see attached :medical certificate].

It was after I was discharged from the hospital, that my family was reliably informed about the attack on the police officers and confiscating their guns. It was at this point that I begun to realize, why my family

was harassed, tortured and prosecuted like this. The government blamed the SCNC for everything, even though we had nothing to do with it. Also, that some of our leaders w later transferred to the Nkondengue Maximum Security Prisons in Yaounde.

On September, 27th 1999 evening at about 5:00pm I was arrested while chairing a Southern Cameroons Youth League meeting in the Akum village, [a sub branch of the SCNC movement]. It was during one of our usual monthly meetings, held at the Akum government Primary School Hall. As youth co-ordinator for Akum, I organized this meeting to raise funds to assist the families of our SCNC leaders and members who were detained since after the 1997 terrorists attacks in the North West Province. This meetings was also scheduled to plan for the October, 1st 38th Independence Anniversary peaceful demonstrations. Tracks were circulated and notices pasted in strategic locations in the village.

This meeting begun as planned by a word of prayer. Then the secretary general read the minutes of the last meeting. Just when I started discussing the issues of the day, a group of armed police officers suddenly entered our meeting hall and ordered the meeting closed, confiscated the SCNC files from me and my secretary general. Then the leader talked on his hand held radio and a black police van arrived. All twenty of us attending the meeting were asked to get in it. We were transported to the Public Security police head office. While there, our names were registered and the males were separated from the females. We were ordered to undress. Necked [sic] we were jailed for two weeks. Ten of us were in our

stinking cell with an iron gate with three walls and only very small windows very high up next to the ceiling. We were starved, tortured and interrogated. Food and water were given to us in very small ration once daily. As the leader of my group I received a more harsh and severe treatment. I was beaten constantly, and on the soles of my feet. Cold water was thrown on the floor, probably to prevent us from sleeping. But we had no option, as later in the night we slept on it for we were tired of standing. Two days later, I was taken out of the cell for interrogation. I was obliged to tell them, since they had all our S.C.N.C documents. This interrogation lasted for what seems eternity, and then I was taken back to jail. Fear griped every one of us, when one of the officers informed us, that we were together with others recently arrested during the October 1st 1999 38th anniversary of the Southern Cameroons Independence Day were to be transferred to the Nkondengue Maximum Security Prisons Yaounde. We were so afraid, some fainted and the others including myself started praying that God would not allow this to happen to us. I cried as I thought I might not see my family again.

My family read about our pending transfer in one of our local Newspaper. They too, were so terrified that they intensified they efforts getting me released before the transfer. My mother and uncle went to the house of a Francophone police officer and pleaded to him to devise means to release me from jail. Fortunately, this officer sympathized with me as my mother pleaded weeping as I was told after my release. He told her to make sure that I went into hiding by leaving the area or country if possible. He

would do so on one of his night shift, and write a report that I escaped from detention. He warned her that if seen by any of his colleagues, I would be shot on the spot, as a prison escapee. Thank God, I was released as planned on the October 9th 1999 at about 3.30am. My mother and uncle were on hand some distance away from the Police Station in his car to pick me up.

I was immediately transported to Mbengwi at the interior of Bamenda where I had been hiding in the Presbyterian Mission. Since then I had been living in fear and the brink of a nervous breakdown, having nightmares and the shivers at nights. I did not participated actively any more in the SCNC for fear of being caught. Since then till I left the country in July 21th 2002, all of my travels were done at nights in the mission cars. While in my hiding at the Presbyterian Mission Mbengwi I was trained as an Evangelist. I assisted our Parish Pastor evangelizing in the interior of Mbengwi.

Things got worst in my hometown, and the police intensified their search for me, when Southern Cameroonians organized peaceful demonstrations on October, 1st 2001 to mark its 40th Independence Anniversary Day. The police and gendarme security officers used firearms to disperse a non- violent demonstrators killing three and arresting about 500 in Kumbo in the North west. In the North west and South west Provinces of Cameroon, more than 100 people were arrested including prominent leaders of the SCNC.

Fortunately for my family, I was selected as a representative of our church to attend a peace making conference in Montreat, North Carolina in July 2002. This conference was organized and sponsored by the Silver Spring Presbyterian Church. Our church's ruling body, the session co-opted me to represent them at this conference. The church helped me with the paperwork for my passport and other travel documents. I was transported in our mission car on the night of July 15th 2002 to Yaounde. On the 16th I went to the U.S. Embassy where I was interviewed by the consular and given a six months visa and left back to Mbengwi the same night. When it was certain I was to travel, our family head telephoned his friend Oumarou, a police commissioner working at the Douala International Airport and explained my situation to him while soliciting his assistance to me. Thus, on the night of July 21th my family accompanied me in a mission car to Douala international Airport. While at the Airport commissioner Oumarou assisted me to confirm my flight and walked me through all the local police check points. I took off on an Air France plane and arrived the U.S. Dulles International Airport on July 22nd 2002.

Since I left Cameroon my family home has been searched several times by police security officers. These officers have been harassing and tormenting sick ageing mother and my wife. My wife is currently a nursing mother of my less than three months old daughter. I feel so much for all they are going through and especially my daughter who has never seen her father. They told my family that they will not rest in peace until I am found and executed.

Thus, my return to Cameroon is like committing suicide for I will surely be shot on sight.[see attached: The Heron News Paper report, page 4]

On October 28th 2002, I received a soul touching letter from my mother. This letter appears to be the second decrying how our home in Akum Bamenda has been regularly visited by police officers tormenting them. The letter further mentioned that, there was another police visit took place on August 7th 2002 when my wife, just recently discharged from the hospital after giving birth to our daughter was mistreated. These officers as quoted, "Were highly in search of me". In order to pressure my family to reveal my where about, one of the officers kicked my mother the causing injury to her arm.

She narrowly was spared arrest and detention thanks to the timely intervention of her neighbors who pleaded on her behalf to be allowed to assisted the nursing mother and baby. My wife also received slaps on face causing severe jaw pain and suffering her. Thereby forcing her to go to the hospital for treatment. At the hospital, she was given painkillers and balm to apply on the swollen jaws. After inflicting these pain and sufferings on my family, the officers left a convocation (sormon) re-iterating that I should report in person to their office.

My family had to escape from all the mistreatment into hiding in our village of Bafut far out of Bamenda town. After reading the letter, I felt so bad for them knowing that I am the cause of so much grief and pain. I spend most of my nights and some days terrified for what could happen to my mum; my

affectionate wife and baby who all might be killed without my baby having been privileged to see her caring Dad. I pray each hour, each day, each night that the Almighty God spares their lives from the security officers. I am anxiously hoping that one- day, we may all be together once more in a country where we no more fear persecution and could think and talk freely. [see attached: Letter from Beatrice Fon ,dated October, 7th 2002.

Also, the human rights situation in our country is very bad. Before the October 1st 2002, peaceful demonstrations by the Southern Cameroonians to mark the 41st anniversary of their Independence, many people were arrested. Prominent leaders of the SCNC and the leader of a Human Rights Defense Group (HRDG) Albert Mukong a prisoner of conscience was arrested and detained in Mamfe gendarme station. He was arrested for being an advocate to the self-determination of the English Speaking Cameroonians and also as an adviser for the SCNC. He was arrested together with other leaders of the SCNC like Nfor Nfor, Chief Ayamba and Mr Enow John.

While in the United States I registered with the SCNC North America, and have been participating actively in all its organized activities. [see attached: Letter from chairman SCNC North America]

I fear returning to Cameroon because I will be shot on sight or perhaps worst-taken tortured then killed without trail. It is for these reasons only and for the sake of my family and country, I respectfully and humbly beseech. the United States government to

grant me political asylum and allow me to live in the United States.

[unsigned; attached to asylum paperwork dated 12/14/2002]

WASHINGTON PRIMARY CARE PHYSICIANS
Peter Basch, M.D.
Laurie Brien Bond. FNP
Deborah Edge, M.D.
Julene O. Jarrett, M.D.
Sos A. Mboijana. M.D.
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March 31, 2004

To Whom It May Concern:

I am writing this amendment to a report regarding Joseph Afanwi (DOB - November 22, 1971) - date of original report was October 17, 2003.

On October 8, 2003, at my office in Washington. DC, I reviewed the statement of, and performed a history and physical exam on Joseph Afanwi, and Mr. Afanwi was re-examined and re-questioned by me on March 30, 2004.

Pertinent findings from the October 8th exam were:

- A 2cm linear jagged scar on the right nares (external part of the nostril).
- A 3cm linear scar on the left anterior thigh.
- Multiple 1cm ovoid scars on both shins and knees.

- The presence of one testis in the scrotum with evidence of surgery on the scrotum and groin.

Revised findings from the March 30th history and exam are:

- A 2cm linear jagged scar on the right nares (external part of the nostril).
- A 3cm linear scar on the left anterior thigh.
- Multiple 1cm ovoid scars on both shins and knees.
- The presence of one testis in the scrotum with evidence of trauma to the scrotum and groin.

The original finding was based on my examination (the presence of one testicle and marks on the scrotum and left groin that have a similar appearance to surgical scars, and the linear scar on the groin is approximately in the area where one would perform an orchiectomy), his statements regarding medical care after the trauma. and my knowledge of how such an injury would be treated in the United States. After taking a further history on March 30th, it is clear that because of language difficulties, I misinterpreted his comments ("medical treatments") as removal as an atrophied testicle. His clarification of these treatments was that he received IV therapy (he did not know of what type – and I would assume antibiotic treatment).

Testicular atrophy can occur after severe blunt trauma, and while it would typically be treated in the

United States with excision and antibiotics, it is certainly possible to treat with just antibiotics, as the testicular remnants can further atrophy and be re-absorbed spontaneously.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Sincerely,
/s/ Peter Basch
Peter Basch,
M.D.

Washington University in St. Louis
Arts & Sciences Department of Political Science

Affidavit of Victor T. Le Vine

I, the undersigned Victor T. Le Vine, being duly sworn and subject to the penalty for perjury, state as follows:

1. I am over eighteen-years old and capable of swearing upon this affidavit and about the matter stated therein. I am a United States citizen and live at 7134 Pershing Avenue, St. Louis, Missouri 63130. I am a Professor Emeritus of Political Science at Washington University in St. Louis, having retired on July 1, 2003, after forty-two years of teaching and scholarship at this institution.

2. One of my academic specialties is African politics, including a focus on Cameroon where, beginning in 1959, I undertook a number of research, lecturing, and teaching tours in Cameroon under various private and public auspices. Among the products of my Cameroon engagement has been three books and over a dozen scholarly articles on Cameroon politics and culture. (I refer you to my curriculum vitae, attached hereto.) I maintain contact with Cameroon by reading Cameroonian journals and publications (in both French and English), by correspondence (electronic and otherwise) with Cameroonians both in and out of the country, by frequent contact with other experts and authorities on Cameroon, and by informal communication with official sources (Cameroonian, American. French, etc.) in contact with Cameroonian affairs. Also, for the past twenty

years, I have consulted *pro bono* to the American and Canadian immigration bar, including advice on some dozen Cameroonian asylum petitioners.

3. I have read Mr. Joseph Afanwi's affidavit. In my opinion, Mr. Afanwi makes a very credible case for asylum since it is clear that should he be forced to return to Cameroon. be would face not only further official persecution for his political view and membership in the Southern Cameroons National Council ("SCNC"), but also the very real possibility of arrest, imprisonment, further physical abuse up to and including torture and death at the hands of the Cameroonian authorities.

4. I base my conclusions on the reading of Mr. Afanwi's affidavit (which I found eminently credible), on my long and intimate knowledge of Cameroonian politics, and on the testimony of other Cameroonian asylum seekers with whose cases I have been involved, all of which is supported by the latest (2003) U.S. State Department report on human rights in Cameroon. the 2002 Human Rights Watch and Amnesty International reports on Cameroon, and other reports by the UN and international human rights organizations.

5. Cameroon's political climate.

5.a. The Oct. 16, 2002, response by the Resource Information Center ("RIC") of what is now the Department of Homeland Security ("DHS") on "Cameroon: Information on the Relationship between the Anglophone and Francophone Communities," indicated (p.1) that "[f]or more than a decade, the

Cameroon government of President Paul Biya has responded with repression and human rights violations to attempts by Anglophone political parties to ameliorate the situation of Anglophones within Cameroon, according to reports of human rights groups, international organizations, and media sources."[1] As far as I can tell, nothing has happened in Cameroon to significantly alter the picture thus presented a year ago by the RIC. The Cameroonian government, through its various security and official agencies, continuously monitors the activities of all known opposition groups, whether based in Cameroon or abroad. including, of course. the main opposition party, the Social Democratic Front ("SDF") and its several offshoots, including the SCNC. The extent to which SDF and SCNC members exercise their political (and civic) rights in Cameroon itself is highly variable, depending on local circumstances, the vigilance (or lack thereof) of local security personnel. community pressures, the presence of friends or relatives in official positions, and the like. Overall, however, opposition groups, including notably Anglophone groups, leaders, and journalists, live an uncertain political existence, not knowing whether, or when, they may be arrested. persecuted, prosecuted, or maltreated for their oppositional activities. Five of the dozen Cameroonian asylum seekers with which I have been involved as consultant or expert witness fled the country during the last six years; their stories included accounts of false and lengthy imprisonment, torture, mistreatment, rape (two women), beatings, humiliation, etc., all for what can only be called

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[1] [Outdated Internet citation to DHS website omitted].

political crimes. (The treatment and/or fate of opposition members, leaders, and groups is noted in some of the reports to which I have alluded above.[2])

5.b. Ever since the Anglophones' claim for greater autonomy or independence reappeared on Cameroon's national scene with the rise of the SDF in 1990, even more so since the SCNC changed its political goal from restoration of the old federal arrangement to outright independence from what it calls "*La Republique du Cameroun*" (or Francophone Cameroon), Anglophone Cameroonians, particularly educated ones, have come increasingly to be regarded with suspicion by the government. Though the country is officially bilingual, and Anglophones are regularly admitted to the University of Yaoundé (the country's premier university) on merit, in practice, except for the "Anglophone campus" at Mamfe, Anglophones have found it increasingly difficult to be admitted to the University of Yaoundé, or to find instruction in English. Those that do enter learn to stay away from oppositional politics, given the presence of police, informers, and other security personnel on campus, all of whom have little hesitation in using force to enforce the official writ.[3]

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[2] US Department of State Country Reports on Human Rights Practices 2002 (March 31, 2003), "Cameroon," particularly pp. 3-12; Amnesty International 2002 Report, "Cameroon."; Human Rights Watch annual reports 2000, 2001; UN Commission on Human Rights, Report of the Special Rapporteur on torture and cruel, inhuman, or degrading reatment or punishment, UN Doc.E/CN.4/1994/31...Cameroon. [Internet citations omitted]

[3] State Department Country Human Rights Report on Cameroon for 2002, op. cit., p. 11(under Sec. 2.a, "Freedom of Speech and Press.)

Even in 1981-82, when I taught at the University of Yaoundé, the Anglophone-Francophone confrontation had already become nasty and contentious, with Anglophone students and faculty claiming bias and discrimination in all aspects of university activity. Anglophone graduates generally do not seek employment in the public sector except in the Anglophone areas, and in any case, excellence in the French language (and the right ethnicity) is the best passport to employment in any sector. It remains, however, that Anglophones have a higher rate of unemployment than Francophones.

5.c. Members of opposition groups find night-time to be the safest for travel for the simple reason that security forces tend to stay at home or in barracks at night and there are no control roadblocks set up. The distances between towns are relatively short (e.g., Bafut to Bamenda - ca. 12 miles), and dissidents can cover the distance on foot, by bicycle, or by car without much difficulty even though the road conditions in the Anglophone part of the country are poor and often unpaved. Safe houses are relatively easy to find, particularly among co-ethnics or kinspeople, and churches do protect dissidents, but usually only in cases of emergency.

5.d. I would strongly advise against returning Mr. Afanwi to Cameroon. He is too well known, and there is always the danger that if he becomes a fugitive in the country, his family becomes vulnerable as well. The authorities keep reasonably good records, and I have no doubt that security offices maintain a dossier on him, as they do on most other dissidents. Given his past history, he will likely be

arrested upon return to Cameroon, and as I suggested earlier, may well face persecution and physical abuse—including torture and death—at official hands.

6. Recent history

6.a. Profs. Jean-Germain Gras and Tatah Mentan, in a recently-published study, convincingly demonstrate that Cameroon's 1992 presidential election, the first multi-party national election in the country since the 1950s and early 1960s, was doubly flawed, by both pre-election and election-day fraud. Pre-election fraud, perpetrated by the regime (in full control of the mechanism of the election) included false, shifting, and disappearing registration lists; that on election day included disappearing votes in strong PDF districts, inflated results in strong pro-government and marginal districts, and shifts of results from one area to another. I agree with their analysis, as I do with their argument that the 1997 presidential election, which returned President Biya to power by a huge margin, was even more deeply flawed by the boycott of the main opposition parties because of the widespread intimidation, violence, and persecution to which they had been subject prior to the election itself.[1] These elections, in both cases

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[1] Jean-Germain Gros and Tatah Mentan, "Elections and Democratization in Cameroon: Problems and Prospects," pp.130-165 in Jean-Germain Gros, ed., Cameroon, Politics and Society in Critical Perspectives (Lanham, MD: University Press of America, 2003). For the record, Gros is an Associate Professor of Political Science at the University of Missouri in St. Louis, and Mentan, an Associate Professor of Politics and Communication at the University of Yaounde, Cameroon. Gros

coupled with preceding local ballots, demonstrated the regime's intention to retain power at all costs, including violent suppression of its opponents and the use of electoral fraud. Those campaigns of suppression, before, during, and after the elections of 1992 and 1997, effectively put all members of opposition parties, including Mr. Afanwi, at political and physical risk.

6.b. There are conflicting stories about the March 1997 attacks on police stations in Bafut, Bamenda, and Kumbo. While the official versions blame opposition groups, including the SCNC, the opposition group intimate that the raids were carried by agitators in government pay. At all events, the culprits (if such there were) were never caught or prosecuted, something which (at least to the opposition) reinforces the latter argument.

6.c. I have heard that the government intensified its persecution of opposition activists (including those of the SCNC) after the October 1, 2001, demonstrations, and am inclined to believe the reports of stepped up arrests, detentions, intimidations, etc., though it is probably impossible. given the habits of official secrecy and the unreliability of opposition reporting, to put reliable, quantifiable estimates on that intensification.[5]

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is Haitian, and Mentan, Cameroonian. Gros and Mentan confirm the judgment of the National Democratic Institute ("NDI"), based in Washington, D.C., that the 1992 presidential election was deeply flawed. (NDI, An Assessment of the October 11, 1992 Election in Cameroon, Washington, D.C., 1993).

[5] Persecution of the SCNC was already underway in 2000; Amnesty International had expressed its alarm about it in one

7. Torture, imprisonment, and other forms of persecution.

7.a. The sources, including notably the U.S. State Department's annual Human Rights Reports on Cameroon already beginning with those in the early 1980s, when Biya became president, chronicle virtually endemic violations of human rights, including arbitrary imprisonment, torture, extra-judicial killings, punitive arson, beatings, and the like, by Cameroon's official police, soldiers, party militias, and security organizations. The sources describe a culture of impunity in which violence and official excess begun by the colonial regime, nourished after independence by the government of Ahmadou Ahidjo (1960-1982), and continued by that of President Biya, became the norm for the country's security agencies. The evidence on all this is extensive and need not be rehearsed here; suffice it to add that the country's prisons tend to be overcrowded, frequently filthy and often pestiferous, rife with corruption, badly managed, in which extrajudicial killing and torture is not uncommon. There is even evidence of "forgotten" prisoners, kept in detention decades after the official dates of their release.

7.b. Those traveling by vehicle in Cameroon, particularly in the larger towns and cities, are likely to encounter multiple official (and sometimes,

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of its press releases: "Fear of Torture and Ill-Treatment; Harsh Prison Conditions," Amnesty Int'l Urgent Action Bulletin, Amnesty Int'l Index: AFR, UA, 13/00, Jan. 20, 2000.

unofficial) roadblocks set out by the police, security agencies, or the military. Arbitrary stop and search is common, usually accompanied by a bribe to those manning the block. On such occasions, the police or security personnel will sometimes check identity papers, and less frequently, compare names to those on what we would call a "wanted list." Warrantless arrest "on suspicion" is common, and people are sometimes detained and then "disappear," but more common still is a form of summons in which an individual is "invited" or "requested" to present himself or herself to a local authority so as to assist it in unspecified inquiries. Such summonses are rarely disobeyed

7.c. It is not unusual for officers and prison guards to help detainees escape. Such events occur if guards or officers are bribed, or if they happen to know the family of the detainee, or are somehow related by kinship or tribal ties and thus feel impelled to help. Detainees held near their home towns tend to "escape" more frequently than others, and that is due to the fact that prison jobs often go to those living near an installation – and proximate to local prisoners and people close to them.

7.d. Mr. Afanwi's story about his two imprisonments is similar to those I heard from several previous asylum petitioners from Cameroon with whom I had contact, matching both their descriptions of conditions in the several prisons where they were held, and of the degrading and violent treatment to which they were subject. I found his story eminently credible.

7.e. Ever since a number of human rights organizations have become active in Cameroon, including one sanctioned by the state (the National Commission on Human Rights and Freedoms ("NCHRF"[6])), few prisoners are left to rot and/or die in prison, which was not infrequently the case before 2000. I have heard of such cases in recent years, but more frequent reports are of "disappearances" and extrajudicial killings in prison and detention, particularly by units such as the infamous "Commandment Operationel" held responsible for the killing of nine youthful detainees near Douala in [text and footnote indicator omitted in record copy].

7.f. Nkondengue Maximum Security Prison in Yaounde is infamous for its harsh treatment of inmates.

8. Social system and customs.

8.a. At airports in Cameroon, senior security officials can and do usher some passengers through security without screening.

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[6] Human Rights Watch, "Protectors or Pretenders? Government Human Rights Commissions in Africa," Cameroon. [Internet cite omitted]. HRW noted that the NCHRF, which had been notably quiescent for the first ten years of its existence (1990-2000), had in 2001 begun to ask questions about some human rights abuses and even published some of its findings.

[7] Amnesty International, "Cameroun, Affaire des 9 'disparus' de Douala: A quand le jugement des responsables?" (Cameroon, the affair of the 9 Douala 'disappeared' when will those responsible be brought to justice?) news release date 17 July 2002 [Internet cite omitted].

8.b. The story of Mr. Afanwi's February 2002 wedding is plausible for the following reasons: (1) officialdom rarely pays much attention to small rural weddings, particularly if the marriages are registered as a matter of bureaucratic routine; (2) clerks and/or registrars may have been related. to either of the couples. or bribed to keep quiet; (3) the Cameroonian police tend to be inefficient, corrupt, and often. incompetent. It is always possible that a wanted person will be overlooked, be it by accident, by chance, or deliberately. However, under pressure, the police are definitely capable and will track down targeted individuals.

9. I will be available for cross-examination by telephone at [redacted] (office) during Mr. Afanwi's hearing at the Immigration Court in Baltimore between 1:00 and 5:00 p.m. (Eastern Standard Time) on Monday, November 3, 2003.

/s/ Victor T Le Vine
Victor T. Le Vine

Oct. 20, 2003

Subscribed and sworn to before me, a notary public, on this 20th day of October, 2003.

/s/ Lisa Calmese

[Notary Seal]

U.S. Department of Justice
Executive Office for Immigration Review
Immigration Court

Matter of		File A 96 269 753
JOSEPH AFANWI,	)	IN REMOVAL
	)	PROCEEDINGS
	)	
Respondent	)	Transcript of Hearing

Before JILL H. DUFRESNE, Immigration Judge

Date: April 14, 2004 Place: Baltimore, Maryland

Transcribed by DEPOSITION SERVICES, INC. at
Rockville, Maryland

Official Interpreter:

Language:

Appearances:

For the Department of Homeland Security:	For the Respondent:
Christoper Cox, Esquire.	Ichiro Morinaga Sarah Warlick, Esquire

* * *

JUDGE TO MR. COX

Q. Okay, Mr. Cox, I obviously have not seen these, but let's hear the Government's position.

A. Well, Your Honor, these documents seem to be filed to help rehabilitate some of the problems with the claims that were evident in testimony. I objection to LLL and MMM in that these individuals are not available for cross-examination.

* * *

With regard to the doctor, once I raised the same objection I raised to his first report in that we still don't have a CV from the doctor, and again, I don't have the opportunity to cross-examine him on his findings. Aside from that, I have no objections to the documents, Your Honor.

MS. WARLICK TO JUDGE

Q. Your Honor, there actually is a CV for Dr. Bausch [sic], the document that's directly after his original statement in Exhibit 6.

* * *

MR. COX TO JUDGE

Q. I stand corrected about the CV, excuse me. I misspoke.

A. Okay.

JUDGE TO MS. WARLICK

Q. Okay.

* * *

A. I also have one more point. We did offer to have Mr. Cox dispose Dr. Bausch [sic] because he's at another disposition this afternoon as the cover letter

on the document states. So, he could not be available, but we did offer to let Mr. Cox dispose him [sic], and we never received a response.

JUDGE TO MR. COX

Q. Mr. Cox.

A. I did not respond, Your Honor.

Q. Okay.

JUDGE FOR THE RECORD

Group Exhibit 10 giving the documents the weight that I deem appropriate.

JUDGE TO MS. WARLICK

Q. Okay. Ready to call your witness? Who will be conducting direct of Dr. Colgar?

MR. MORINAGA TO JUDGE

Q. I will.

A. Okay. Call Dr. Colgar to the stand.

* * *

In the Matter of	)	
	)	
Joseph AFANWI	)	File No. A-96-269-753
	)	
In removal proceedings	)	
	)	

Affidavit of Fon Prescilla Neh

I, Fon Prescilla Neh, being duly sworn, do hereby declare as follows:

1. I am over 18 years of age. I am fully competent to make this affidavit and I have personal knowledge of the facts stated in this affidavit.

2. I am a native of Cameroon. I moved from Cameroon to the United States on January 18, 2006. I currently live at 790 Fairview Avenue, Apartment 312, Takoma Park, Maryland, 20912. I am a lawful permanent resident of the United States.

3. I am Joseph Afanwi's step-sister. My father and Joseph's mother were married. We grew up in the same household.

4. Before moving to the United States, I lived in the village of Akum in Bamenda, Cameroon. I lived in my family's home with my younger sister, Fon Seraphine Enjong, her daughter, Blessing Neh, my younger brother, Fon Alphonse, a cousin, Fon Ernest Mukoh. Joseph Afanwi's wife, Quinta Bih Tanda their three-year old daughter, Mildred Lum Afanwi, and Joseph Afanwi's mother, Beatrice Fon.

5. At approximately 10 p.m. one night in early December 2005, I was sleeping in my bedroom when I heard loud banging at the main door and men outside yelling "This is the police! Let us in!"

6. I left my bedroom and ran to the main room. Everyone in the house heard the banging and joined me in the main room. Beatrice Fon, Joseph Afanwi's mother, was at work at the time and was not at home. The police were banging on the door and yelling "Police! Let us in or we will break the door down!" I was frightened and did not want to let them into the house. but I knew they would not go away unless we opened the door.

7. I knew that the police had come looking for Joseph because they had been to the house looking for him in the past. I had also been told that the police bad taken Joseph's wife, Quinta Bih Tanda, to the police station at least three times during 2005 to question her about Joseph's whereabouts. She told me that she told the police that Joseph was in America but that they did not believe her and that they thought she was helping to hide him.

8. The police banged on the door and yelled for approximately five minutes before Joseph's wife opened the door. She was chosen to open the door because she was the oldest and because she had dealt with the police regarding Joseph on several prior occasions.

9. When Joseph's wife opened the main door, four armed and uniformed police officers rushed into the main room. They waived a piece of paper that I was

unable to read and said that they were looking for Joseph to penalize him for participating in the SCNC.

10. I watched as one of the police officers pushed Joseph's wife and another seized her hand. Together, the two police officers dragged Joseph's wife and daughter into a bedroom. Joseph's wife looked very scared and the baby was crying.

11. The other two police officers told me and the rest of the family to sit on the floor in the main room. They told us not to move and not to speak.

12. After approximately twenty minutes, the two police officers who had been questioning Joseph's wife left the bedroom. I watched as they went from room to room looking for Joseph. I could hear Joseph's wife and daughter crying.

13. While two of the police officers conducted the search, Joseph's wife and daughter stayed in the bedroom and the rest of us remained in the main room with two police officers. They repeatedly asked us, "Where is Joe?" and said that they did not believe that he had gone to the United States. They said that they believed he was involved in the ongoing SCNC activities in the area.

14. I watched the two officers go into each room and heard them moving furniture. It took them approximately ten minutes to go through every room. At that point, they came back into the main room where we were sitting. After warning us that they "will be back for Joseph," the four police officers left the house.

15. After the police left, I went into the rooms where the officers had been and saw a mess. Things were turned over, the beds were moved, and the cupboards had been searched.

16. Joseph's wife told me that the police officers had asked her where Joseph was when they took her and her daughter into the bedroom. She said that she told them that Joseph was in the United States, but that they did not believe her. She also told me that they threatened to put her in jail if she did not speak "the truth" about where Joseph was.

17. The next time Joseph called the family home in Cameroon, I told him about the police searching the house and looking for him.

/s/ Fon Prescilla Neh
Fon Prescilla Neh

Subscribed and sworn to before me on this the 27th day of February, 2005

/s/ [illegible]
Notary Public in the
District of Columbia

My Commission Expires:

March 31, 2006

Supreme Court, U.S.
FILED
AUG 26 2009
OFFICE OF THE CLERK

No. 08-906

In the Supreme Court of the United States

JOSEPH AFANWI, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether the Fifth Amendment affords an alien a right to relief based on the ineffective assistance of privately retained counsel in the course of seeking judicial review of a final order of removal entered by the Board of Immigration Appeals.

2. Whether the Board of Immigration Appeals has jurisdiction to reopen proceedings to afford relief from his counsel's failure to file a timely petition for review with the court of appeals of the Board's final order of removal.

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In the Supreme Court of the United States

No. 08-906

JOSEPH AFANWI, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-22a) is reported at 526 F.3d 788. The decision of the Board of Immigration Appeals denying petitioner's motion to reopen (Pet. App. 23a-25a) is unreported. Earlier decisions of the Board of Immigration Appeals (Pet. App. 26a, 27a-29a) and the immigration judge (Pet. App. 30a-71a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 19, 2008. A petition for rehearing was denied on August 19, 2008 (Pet. App. 1a-2a). On October 27, 2008, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including January 16, 2009, and the petition was filed on that date.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Immigration and Nationality Act (INA) defines a "refugee" as an alien who is unwilling or unable to return to his or her country of origin "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A). If the "Secretary of Homeland Security or the Attorney General determines" that an alien is a refugee, the Secretary or the Attorney General "may," in his or her discretion, "grant asylum" in the United States. 8 U.S.C. 1158(b)(1)(A). In addition to the discretionary relief of asylum, mandatory withholding of an alien's removal from the United States is available "if the Attorney General decides that the alien's life or freedom would be threatened in [the country of removal] because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1231(b)(3)(A). An applicant bears the burden of establishing that he or she is a refugee eligible for asylum or that his or her life or freedom would be threatened so as to warrant withholding of removal. 8 C.F.R. 208.13(a), 208.16(b).

A person who is present in the United States and fears torture if removed to a particular country may obtain protection under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85. The CAT has been implemented through Department of Justice regulations. See 8 C.F.R. 1208.16-

1208.18; see also Foreign Relations Authorization Act, Fiscal Years 1998 and 1999, Pub. L. No. 105-277, Div. G, Subdiv. B, § 2242, 112 Stat. 2681-822 (8 U.S.C. 1231 note). To obtain protection under the CAT, an alien must demonstrate that it is more likely than not that he or she would be tortured in the country of removal. 8 C.F.R. 1208.16(c)(3).

2. a. Petitioner, a native and citizen of Cameroon, entered the United States in July 2002 as a non-immigrant visitor with authorization to remain in the United States until January 23, 2003. Pet. App. 4a, 31a. On January 20, 2003, petitioner filed an application for asylum, withholding of removal, and CAT protection with the former Immigration and Naturalization Service (INS). *Id.* at 4a. An asylum officer referred petitioner's application to an immigration judge (IJ). *Id.* at 4a, 60a. On March 11, 2003, the INS initiated removal proceedings by filing a Notice to Appear, alleging that petitioner was removable under 8 U.S.C. 1227(a)(1)(B) for remaining in the United States longer than permitted. Pet. App. 4a-5a, 31a.

b. On July 22, 2004, the IJ denied petitioner's application for asylum, withholding of removal, and CAT protection on account of petitioner's lack of credibility. Pet. App. 30a-71a. The IJ found that there were significant discrepancies between petitioner's original and amended affidavits and inconsistencies between petitioner's account of mistreatment and his mother's affidavit. *Id.* at 62a-63a. In addition, the IJ determined that petitioner's testimony was improbable and uncorroborated, and that the corroborating evidence that petitioner did provide was inconsistent, of little evidentiary value, and lacking in detail. *Id.* at 64a-67a. The IJ thus found that petitioner failed to prove that he had been arrested and

harmed, or that he had escaped from prison and was wanted by governmental authorities in Cameroon. *Id.* at 68a. The IJ also found that petitioner's claims of country-wide persecution in Cameroon were not reasonable. *Id.* at 69a. Accordingly, the IJ denied petitioner's asylum-related claims and, for similar reasons, his claims for withholding of removal under the INA and the CAT. *Id.* at 67a-71a.

3. a. Petitioner appealed the IJ's decision to the Board of Immigration Appeals (Board). See Pet. App. 27a. Petitioner's counsel, Daniel M. Fisher-Owens, later filed a notice of appearance with the Board, listing his address as follows:

> Berliner Corcoran & Rowe, L.L.P.
> 1101 17th St. NW, Suite 1100
> Washington, DC 20036

Admin. R. 143 (A.R.). Thereafter, the Board issued a briefing schedule and mailed it to the following address:

> Daniel M. Fisher-Owens
> 1101 17th Street NW
> Suite 1100
> Washington, DC 20036-0000

A.R. 141-142. On June 23, 2005, petitioner filed his brief with the Board, including a copy of the briefing schedule. A.R. 115-117.

b. On November 29, 2005, the Board dismissed petitioner's appeal. Pet. App. 27a-29a. The Board concluded that the IJ did not err "in her conclusion that [petitioner had] not presented sufficient evidence or sufficiently credible testimony in support of the claim." *Id.* at 29a. The Board served its decision on petitioner's counsel at the same address it had used to serve the briefing schedule. *Id.* at 5a, 10a nn.14 & 15. Petitioner

did not file a timely petition for judicial review of the Board's November 29, 2005 decision. *Id.* at 5a.

c. On January 12, 2006, petitioner filed a motion with the Board requesting that it reissue its November 29, 2005 decision. A.R. 89; Pet. App. 5a. In his motion, petitioner observed that the Board's decision had been mailed to his attorney, but that the address omitted his attorney's law firm's name. *Id.* at 5a, 10a & n.14. Petitioner argued that the incomplete address "could have delayed delivery" of the Board's decision, *id.* at 5a, but he noted he could not confirm that fact, because counsel had transferred offices and did not routinely check his mail between the time the order was mailed and January 6, 2006. A.R. 91; see Pet. App. 9a-10a. Petitioner argued that it would "be unfair to penalize [him] for counsel's failing," and requested that the Board use its "discretionary and equitable powers to rescind and reissue" its prior decision. A.R. 93; see Pet. App. 10a-11a.

On February 13, 2006, the Board denied petitioner's motion to reissue its November 29, 2005 decision because the decision had been mailed to the address previously provided by counsel and there was no error attributable to the Board in serving the decision. Pet. App. 26a.

d. On February 27, 2006, petitioner—acting through new counsel—filed a motion to reopen with the Board, claiming that he received ineffective assistance of counsel due to his prior attorney's failure to file a timely petition for review of the Board's November 29, 2005 decision, and also arguing that new evidence relating to his asylum claim warranted reopening of his proceedings. A.R. 6; Pet. App. 5a, 23a.

The Board denied petitioner's motion to reopen on May 12, 2006. Pet. App. 23a-25a. With respect to peti-

tioner's claim of ineffective assistance of counsel, the Board found that it lacked jurisdiction over a claim based on "any ineffective assistance the [alien] received subsequent to the final order of the Board and in connection with an appeal of the Board's decision." *Id.* at 24a. The Board observed that petitioner had attempted to comply with the procedural requirements under *In re Lozada*, 19 I. & N. Dec. 637 (B.I.A.), review denied, 857 F.2d 10 (1st Cir. 1988), but found that it could review due process claims only as they pertained to "proceedings before the Immigration Judge or the Board" itself.[1] Pet. App. 24a. With respect to petitioner's request to reopen the proceeding on the basis of new evidence, the

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[1] In *Lozada*, the Board held that an alien's motion to reopen based on the alleged ineffective assistance of counsel should be evaluated in light of the following three requirements: (1) the motion should be "supported by an affidavit" from the alien setting forth, among other things, "the agreement that was entered into with former counsel with respect to the actions to be taken * * * and what counsel did or did not represent to the [alien] in this regard"; (2) the "former counsel must be informed of the allegations [leveled against him] and allowed the opportunity to respond"; and (3) the motion should reflect "whether a complaint has been filed with appropriate disciplinary authorities" with respect to any violation of counsel's "ethical or legal responsibilities" or an explanation for why one was not filed. See *In re Lozada*, 19 I. & N. Dec. at 639. The *Lozada* factors would have been partially superseded on a prospective basis by Attorney General Mukasey's initial decision earlier this year in *In re Compean*, 24 I. & N. Dec. 710, 741-742 (2009) (prescribing new filing requirements with respect to alien's motions addressing counsel's deficient performance, but providing that the *Lozada* factors would continue to apply to motions filed before the Attorney General's decision). On reconsideration, however, Attorney General Mukasey's opinion in *Compean* was vacated, and in a new opinion Attorney General Holder ordered the initiation of a Department of Justice rulemaking to evaluate whether the *Lozada* administrative framework for considering claims based on allegedly deficient performance by counsel should be revised. *In re Compean*, 25 I. & N. Dec. 1, 3 (2009).

Board found that, although the evidence was new and previously unavailable, it failed to remedy "the shortcomings of [petitioner's] claim, such as his lack of credibility, and further fail[ed] to establish that he is prima facie eligible for relief." *Ibid.* Accordingly, the Board denied petitioner's motion to reopen. *Id.* at 25a.

4. On February 27, 2006, petitioner filed a petition for review in the court of appeals, seeking review of the Board's November 29, 2005 denial of his applications for asylum, withholding of removal, and CAT protection. Pet. App. 6a. He later filed a "corrected" petition for review, also seeking review of the Board's February 13, 2006 denial of his motion to rescind and reissue. *Ibid.* He further amended his petition for review on June 8, 2006, to request review of the third Board decision (denying his motion to reopen). *Ibid.* The court of appeals denied the petition for review of all three Board decisions on May 19, 2008. *Id.* at 3a-22a.

a. With respect to the Board's November 29, 2005 denial of petitioner's applications for asylum, withholding of removal, and CAT protection, the court of appeals held that it lacked jurisdiction because the petition for judicial review had not been filed within the 30-day period allowed by 8 U.S.C. 1252(b)(1). Pet. App. 9a-10a.

b. The court also denied the petition for review regarding petitioner's motion to rescind and reissue the Board's November 29, 2005 decision, concluding that "the decision to rescind and reissue an order of removal is properly left to the discretion of the [Board]." Pet. App. 11a. The court deferred to the Board's decision to deny the motion, because petitioner had not established that the Board was at fault for his failure to receive in a timely way the decision denying his asylum-related claims. *Ibid.*

c. Turning to the Board's denial of petitioner's motion to reopen, the court of appeals affirmed the Board's decision on all grounds. Pet. App. 11a-21a. First, the court concluded that, because "the new evidence" petitioner presented in support of reopening did not "create a well-founded fear of persecution," the Board did not abuse its discretion in denying the motion on the basis of new evidence. *Id.* at 12a.

Next, the court affirmed the Board's determination that it lacked jurisdiction over petitioner's claim that he received ineffective assistance of counsel as a result of counsel's failure to file a petition for review within the 30-day period allowed by 8 U.S.C. 1252(b)(1). Pet. App. 13a-15a. The court recognized that there is "no settled or uniform view," and that the Board itself had "issued contradictory opinions on the subject." *Id.* at 13a. But the court determined that the Board lacked jurisdiction under the governing regulations "over an ineffective assistance claim arising out of an alien's counsel's failure to file a timely petition for review with the court of appeals," *id.* at 14a, because such an action occurs "before [the] court, not before the Board," *id.* at 15a, and the Board's jurisdiction is limited by regulation to a review of questions or issues "in appeals from decisions of immigration judges." *Id.* at 14a (quoting 8 C.F.R. 1003.1(d)(3)(ii)).

Finally, the court of appeals addressed petitioner's claim of ineffective assistance of counsel based on counsel's failure to file a timely petition for review. Pet. App. 15a-21a. The court concluded that the Constitution does not "guarantee[] effective assistance of counsel to an alien in removal proceedings." *Id.* at 15a-16a. The court reasoned that while aliens have a statutory privilege under 8 U.S.C. 1362 to retained counsel in administra-

tive removal proceedings, and enjoy a Fifth Amendment right to due process in those proceedings, the Fifth Amendment does not entitle aliens to a remedy for the ineffectiveness of their retained counsel, because due process is violated only by wrongful actions of the federal government or an individual engaging in "state action." Pet. App. 16a-19a. The court held that, because petitioner's counsel was a private actor and his alleged ineffectiveness was a purely private act, petitioner had not been deprived of his Fifth Amendment rights. *Id.* at 20a-21a. The court therefore dismissed the petition for review "with respect to [petitioner's] claim of ineffective assistance of counsel." *Id.* at 21a.

DISCUSSION

Petitioner renews his claim (Pet. 17-28) that he has a constitutional entitlement to relief based on the assertedly deficient performance of his privately retained counsel in failing to file a timely petition for judicial review of a final order of removal. Petitioner also renews his claim (Pet. 28-29) that the Board had jurisdiction to grant relief based on his counsel's failure—after the Board had already issued a final order of removal—to file a timely petition for review with the court of appeals. The court of appeals correctly held that there is no constitutional right to effective performance by privately retained counsel in removal proceedings, including on judicial review. But the court erroneously affirmed the Board's conclusion that the Board lacks the power to reopen removal proceedings in order to remedy an attorney's failure to file a timely petition for review of a final order of removal. The Attorney General has since made clear that the Board does have that authority. See *In re Compean*, 25 I. & N. Dec. 1, 3 (2009). Accordingly, the

court of appeals' judgment should be vacated and the case remanded for further consideration in light of the Attorney General's decision in *Compean* that the Board has jurisdiction to provide petitioner with appropriate relief. The court of appeals may then in turn remand to allow the Board to decide in the first instance whether petitioner should be afforded an administrative remedy for the ineffective assistance of counsel he alleges. Because that course could render the constitutional issue moot, and because the case law in the courts of appeals on the constitutional question is still developing, this Court's review of the constitutional question is unwarranted.

1. Petitioner contends (Pet. 17-28) that his privately retained lawyer's failure to file a timely petition for review of his order of removal deprived him of due process in violation of the Fifth Amendment. Further review of that claim on the merits is unwarranted, but this case should be remanded for an opportunity to permit the Board to consider whether, in light of the ineffective assistance of counsel petitioner alleges, the Board should exercise its discretion to grant petitioner's motion to reopen.

a. The court of appeals correctly held that the Fifth Amendment does not confer a right to effective assistance by privately retained counsel in immigration proceedings. As this Court has explained, when the government is not constitutionally required to furnish counsel in the relevant proceedings, the errors of privately retained counsel are not imputed to the government. See *Coleman* v. *Thompson*, 501 U.S. 722, 752-754 (1991). When "[t]here is no constitutional right to an attorney" furnished by the government in a particular kind of proceeding, a client "cannot claim constitutionally ineffec-

tive assistance of counsel in such proceedings"; in that situation, the attorney performs in a private capacity as the client's agent, not a state actor, and the client therefore must "'bear the risk of attorney error.'" *Id.* at 752-753 (quoting *Murray* v. *Carrier*, 477 U.S. 478, 488 (1986)). In "our system of representative litigation . . . each party is deemed bound by the acts of his lawyer-agent." *Id.* at 753 (quoting *Link* v. *Wabash R.R.*, 370 U.S. 626, 634 (1962)).

As petitioner implicitly concedes by relying on "the statutory and regulatory policy of encouraging and facilitating aliens in retaining counsel" (Pet. 27), there is no constitutional right to appointed counsel in immigration proceedings. Rather, Congress has provided as a statutory matter that an alien shall have the "privilege" of being represented by counsel of the alien's choice "at no expense to the Government." 8 U.S.C. 1229a(b)(4)(A), 1362; cf. 28 U.S.C. 1654 (parallel provision providing that a party may appear through counsel in any court of the United States). Accordingly, when an alien has invoked that privilege and retained a lawyer to represent him in removal proceedings or in filing a petition for review, counsel's actions are not those of the government, but are instead attributed to the client.

Petitioner contends (Pet. 26) that the "state action" that is needed to find a due process violation in this context arises from the government's reliance on the removal order at the end of the proceeding. But that contention proves too much, because it would preclude the government from relying on any civil court order without exposing itself to the risk of collateral litigation about asserted malpractice on the part of opposing counsel. And petitioner's attempt (Pet. 19-20) to distinguish removal proceedings from other civil litigation fails. He

argues that, because a removal proceeding threatens to impose such a great loss on an alien, it is "barely distinguishable from criminal condemnation" and thus triggers a Fifth Amendment right to the effective assistance of counsel analogous to that available in the criminal context. Pet. 19 (quoting *M.L.B.* v. *S.L.J.*, 519 U.S. 102, 119 (1996)). This Court, however, has resisted calls to view immigration proceedings as equivalent to criminal trials. See *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) ("Consistent with the civil nature of the [immigration] proceeding, various protections that apply in the context of a criminal trial do not apply in a deportation hearing."); see also *Negusie* v. *Holder*, 129 S. Ct. 1159, 1169 (2009) (Scalia, J., concurring) ("This Court has long understood that an 'order of deportation is not a punishment for crime.'") (quoting *Fong Yue Ting* v. *United States*, 149 U.S. 698, 730 (1893)). And if petitioner is correct that immigration proceedings should be treated like criminal proceedings with respect to issues of legal representation, the Constitution would require the government to furnish counsel to those facing removal proceedings. In the absence of any requirement of that kind, petitioner's claim—concerning only privately retained counsel—has no apparent basis.

b. Petitioner correctly explains (Pet. 11-13) that there is disagreement in the courts of appeals about whether aliens in immigration proceedings have a Due Process Clause entitlement to effective performance by their privately retained counsel. Like the Fourth Circuit in this case, the Seventh Circuit and the Eighth Circuit have held there is no such constitutional right. See *Magala* v. *Gonzales*, 434 F.3d 523, 525-526 (7th Cir.

2005);[2] *Rafiyev* v. *Mukasey*, 536 F.3d 853, 861 (8th Cir. 2008). By contrast, a number of other circuits have suggested or held that the Due Process Clause creates a right to assistance by counsel that is sufficiently effective to prevent removal proceedings from being fundamentally unfair. See *Zeru* v. *Gonzales*, 503 F.3d 59, 72 (1st Cir. 2007); *Aris* v. *Mukasey*, 517 F.3d 595, 600-601 (2d Cir. 2008); *Fadiga* v. *Attorney Gen.*, 488 F.3d 142, 155 (3d Cir. 2007); *Denko* v. *INS*, 351 F.3d 717, 723-724 (6th Cir. 2003); *Nehad* v. *Mukasey*, 535 F.3d 962, 967 (9th Cir. 2008); *Tang* v. *Ashcroft*, 354 F.3d 1192, 1196 (10th Cir. 2003); *Dakane* v. *United States Att'y Gen.*, 399 F.3d 1269, 1273-1274 (11th Cir. 2005).[3]

Notwithstanding that disagreement among the courts of appeals, this Court should not resolve the constitutional question at this time. The recent decisions of the Fourth and Eighth Circuits demonstrate that jurisprudence on the issue is still developing in the courts of appeals.[4] And a recent Ninth Circuit decision "as-

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[2] As petitioner notes (Pet. 13 n.1), other Seventh Circuit decisions do contemplate that counsel in immigration proceedings "may be so ineffective as to have impinged upon the fundamental fairness of the proceeding in violation of the fifth amendment due process clause." *Mojsilovic* v. *INS*, 156 F.3d 743, 748 (1998) (quoting *Castaneda-Suarez* v. *INS*, 993 F.2d 142, 144 (7th Cir. 1993)). Petitioner also quotes (Pet. 13 n.1) the passing reference to the Fifth Amendment in *Sanchez* v. *Keisler*, 505 F.3d 641, 647 (7th Cir. 2007), but the court's holding there was that the alien "did not have the fair hearing to which *the immigration statutes* entitle her." *Id.* at 649 (emphasis added).

[3] The Fifth Circuit has not decided the constitutional question, but has instead "repeatedly assumed without deciding that an alien's claim of ineffective assistance may implicate due process concerns under the Fifth Amendment." *Mai* v. *Gonzales*, 473 F.3d 162, 165 (2006).

[4] Other pending petitions for writs of certiorari challenge later decisions by the Fourth Circuit that rely on the decision in this case. See

sume[d]" without deciding that aliens have "a constitutional right to the assistance of counsel in immigration proceedings." *Alcala* v. *Holder*, 563 F.3d 1009, 1015 n.11 (2009) (expressing no opinion "on the effect of" the Attorney General's later-vacated opinion in *Compean*, discussed at note 1, *supra*). Furthermore, as discussed below, there is no need to resolve the constitutional question because petitioner may receive an administrative remedy of exactly the kind he seeks: If the Board grants petitioner's motion to reopen based on his counsel's failure to file a petition for review, that administrative decision would moot petitioner's constitutional claim.

2. Although the Constitution does not furnish a right to effective assistance by privately retained counsel in removal proceedings, the Attorney General has the authority, in his oversight of the administrative removal process, to afford relief to an alien in circumstances the Attorney General deems appropriate as a matter of discretion, including circumstances attributable to errors by counsel in such proceedings. The Board has recognized an administrative remedy for deficient performance by counsel since at least 1988. And the Attorney General has recently directed the initiation of a Department of Justice rulemaking to consider whether, after twenty years, the *Lozada* factors that govern the Board's administrative resolution of claims of ineffective assistance (see note 1, *supra*) should be revised. Petitioner's case continues to be governed by "the *Lozada* framework and standards as established by the Board before *Compean*," *In re Compean*, 25 I. & N. Dec. at 3,

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Massis v. *Holder*, petition for cert. pending, No. 08-1392 (filed May 8, 2009); *Machado* v. *Holder*, petition for cert. pending, No. 08-7721 (filed Dec. 11, 2008).

but under those standards as well, he may be entitled to administrative relief as a result of his attorney's error.

In this case, the court of appeals disposed of petitioner's claim about his counsel's performance by holding that there is no *constitutional* right to effective assistance of counsel. Pet. App. 21a. Yet, because the court of appeals affirmed the Board's determination that the Board lacked jurisdiction to grant any relief based on counsel's failure to file a timely petition for review in the court of appeals, *id.* at 13a-15a, petitioner never received a decision on the merits from the Board about whether he should be afforded administrative relief from the final removal order because of counsel's error.[5]

Petitioner contends (Pet. 28-29) that the court of appeals erred in concluding that the Board lacks jurisdiction to reopen proceedings on the basis of an attorney's failure to file a timely petition for review in the court of appeals. As petitioner notes (Pet. 14), other circuits have stated that the Board may consider a motion to reopen in such circumstances. And, as the court of appeals noted, the Board "itself ha[d] issued contradictory opinions" on the question. Pet. App. 13a. Since the court's decision in this case, however, the Attorney Gen-

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[5] The question of the Board's jurisdiction to reopen proceedings on the basis of an attorney's failure to file a timely petition for review in the court of appeals is a purely legal question. Accordingly, the jurisdiction of the court of appeals (and therefore of this Court) to remand to the Board to allow it to determine the extent of its discretion in this case is not likely to be affected by any decision this Court renders in *Kucana* v. *Holder*, cert. granted, No. 08-911 (Apr. 27, 2009). Regardless of whether 8 U.S.C. 1252(a)(2)(B)(ii) generally precludes judicial review of the denial of a motion to reopen immigration proceedings (the issue in *Kucana*), the question whether the Board has jurisdiction under the governing regulations to grant relief raises a "question[] of law" that would still be reviewable under 8 U.S.C. 1252(a)(2)(D).

eral has clarified that the Board does have discretion to reopen proceedings on the basis of events that occur after the entry of a final order of removal, including the failure by counsel to file a timely petition for review. See *In re Compean*, 25 I. & N. Dec. at 3; see also, *e.g.*, *Gjondrekaj* v. *Mukasey*, 269 Fed. Appx. 106, 108 (2d Cir. 2008). In light of that clarification, it would be appropriate for this Court to vacate the court of appeals' decision on question two and remand the case to that court to allow the Board to adjudicate petitioner's claim of ineffective assistance unencumbered by the Board's previous conclusion that it lacked jurisdiction to address that claim. Although the Board, because of that erroneous jurisdictional ruling, did not address the merits of petitioner's underlying claim concerning counsel's actions, the Board did recognize that petitioner had "attempted to abide by the procedural requirements established in" *Lozada*. Pet. App. 24a. There thus appears to be some prospect that the Board would entertain his claim on the merits on remand and grant him relief from the harm he suffered as a result of his lawyer's error.

CONCLUSION

With respect to question one, the petition for a writ of certiorari should be denied. With respect to question two, the judgment of the court of appeals should be vacated, and the case should be remanded to the court of appeals for further consideration in light of the Attorney General's determination in *In re Compean*, 25 I. & N.

Dec. 1, 3 (2009), that the Board has jurisdiction to grant administrative relief in a case such as this.

Respectfully submitted.

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No. 08-906

IN THE

Supreme Court of the United States

JOSEPH AFANWI,

Petitioner,

v.

ERIC H. HOLDER, JR., Attorney General,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY FOR PETITIONER

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REPLY FOR PETITIONER

The Petition for Certiorari showed that the Fourth Circuit's decision created a deep circuit split, now standing at least 7-2, on the important and recurring issue of whether an alien in removal proceedings has a constitutional Due Process remedy for prejudicial ineffective assistance of retained counsel. The Petition further showed that the Fourth Circuit likewise created a split by holding that the Board of Immigration Appeals ("BIA") has no authority to craft a remedy for ineffective assistance at the petition-for-review stage. (Pet. 11-17, 28-29.) But for these errors, Mr. Afanwi would have a strong claim to merits relief on his asylum, withholding of removal, and Convention Against Torture claims, and thus his case presents an appropriate vehicle for review. (*Id.* 29-35.)

The Government's response does not dispute the circuit splits, that the Due Process Clause issue is recurring and of great importance, or that Petitioner has claims that may merit relief. (Opp. 12-13, 15-16.) Nonetheless, the Government seeks to have the Court deny certiorari on the Fifth Amendment issue, grant the petition on the second question, vacate the Fourth Circuit's decision, and remand for further consideration. (*Id.* 16.)

The Government recommends such a disposition solely based on the prospect that Petitioner might be able to navigate the uncertain contours of an administrative remedy that the Fourth Circuit has previously denied him, that has already radically changed twice since January 2009, and that may change further following a pending rulemaking. (*See*

id. 6, 14-15 & n.1.) But with a GVR, there is no guarantee that the Fourth Circuit will reverse its position that the Government concedes is erroneous, nor will Petitioner necessarily have an administrative remedy available.

Nor will the Government's suggested disposition resolve the deep circuit split on the due process issue; it would thus preclude the nation's courts from finally "speak[ing] with one voice" on this critical immigration matter. *Zadvydas v. Davis*, 533 U.S. 678, 700 (2001) (internal quotation marks omitted). Unless and until this Court addresses this issue, it will be subject to the political whims of the ruling Administration, as the recent profound changes in policy on this issue demonstrate. The current situation is untenable and requires this Court's intervention.

Accordingly, the Court should grant the petition as to both questions presented, and decide the issues on the merits. In the event the Court decides not to review the questions presented at this time, however, at a minimum, the Court should grant, vacate, and remand based on the conceded error in the Fourth Circuit's holding that the BIA cannot fashion an administrative remedy for such ineffective assistance.

I. THE GOVERNMENT CONCEDES THAT THE CIRCUITS ARE SPLIT ON BOTH QUESTIONS PRESENTED

The Government concedes, as it must, that "there is disagreement in the courts of appeals about whether aliens in immigration proceedings have a Due Process Clause entitlement to effective

performance by their privately retained counsel," with seven circuits finding such a due process right, against two, or possibly three,[1] circuits rejecting such a right. (Opp. 12-13.) It also agrees that the Fourth Circuit stands alone in rejecting the BIA's jurisdiction to fashion relief from ineffective assistance at the petition-for-review stage, contrary to the other circuits to address the issue. (*Id.* 15.)

Nonetheless, the Government suggests that the Court should disregard the deep circuit split on the constitutional issue because "jurisprudence on the issue is still developing," citing only the Fourth Circuit's decision below, subsequent Fourth Circuit decisions, the Eighth Circuit's decision in *Rafiyev v. Mukasey*, 536 F.3d 853 (8th Cir. 2008), and a footnote in a Ninth Circuit panel decision expressing "no opinion" on the effect of the now-vacated January 7, 2009 decision in *In re Compean*, 24 I. & N. Dec. 710 (A.G.), *vacated*, 25 I. & N. Dec. 1 (A.G. 2009) on the merits of the constitutional issue. (Opp. 13-14 & n.4). The Government's statement that the law is "developing" is baseless, as it cites no cases where one of the Circuits adopting the majority position has reevaluated and reversed its precedent based on the views expressed in *Afanwi*, *Rafiyev*, or *Compean*.

Indeed, the evidence is to the contrary. Several courts in the majority have recently reaffirmed their circuit's precedent that aliens have a due process right to effective assistance in removal proceedings, and have addressed such constitutional claims on the

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[1] The Government counts the Seventh Circuit as rejecting a due process right to effective assistance, but recognizes other Seventh Circuit authority to the contrary. (Opp. 13 n.2.)

merits. *See, e.g., Torres-Chavez v. Holder*, 567 F.3d 1096, 1100 (9th Cir. June 5, 2009) (reaffirming that "aliens' counsel can be so ineffective as to deprive them of their Fifth Amendment right to due process of law" and addressing constitutional ineffective assistance claim on the merits) (citation and internal quotation marks omitted); *Kapic v. Holder*, 321 F. App'x 49, 51 (2d Cir. Apr. 7, 2009) ("contrary to the government's argument that this Court lacks jurisdiction to address Kapic's ineffective assistance of counsel claim, we have found that because such claims are rooted in the Fifth Amendment due process clause, they are constitutional claims"); *Perez v. U.S. Att'y Gen.*, 321 F. App'x 876, 880 (11th Cir. Mar. 24, 2009) ("If an alien has counsel represent him in removal proceedings, the alien has a due process right to effective assistance of counsel."); *Tjong v. Mukasey*, 308 F. App'x 957, 959-60 & n.1 (6th Cir. Jan. 30, 2009) (holding that Government's claim denying existence of due process remedy "has been soundly rejected by this court" and "declin[ing]" to reconsider circuit precedent in light of *Compean*).

In short, there remains a deep circuit split on the core constitutional issue raised in the Petition, and there is no reason to believe that the issue will benefit from further "development" in the circuits. Given the acknowledged importance of this issue, this Court should address it now.

II. THE GOVERNMENT'S ARGUMENTS IN OPPOSITION TO THE FIFTH AMENDMENT CLAIM ARE MERITLESS

The Petition demonstrated that the Fifth Amendment protects a right to "essential fairness of

the state-ordered proceedings," including protection against ineffective assistance of counsel, when the Government itself seeks to deprive a person of liberty, even in nominally "civil" cases. (Pet. 18-20.) This Court has recognized that the Fifth Amendment applies to removal proceedings and has also recognized that deportation is the equivalent of banishment or exile, and may be a "most serious" penalty, even though it is "technically" not criminal. (*Id.* 15-16.) The penalty is at its most serious when an alien presents well-founded claims that he faces persecution or torture if he is deported. (*Id.* 20-22.)

The Petition also showed that effective assistance of retained counsel is critical to ensuring the fairness of removal proceedings, and that by statute, aliens are provided with a right to retain counsel and that the Government has affirmative duties to facilitate an alien's retention of counsel. (*Id.* 20-23.) Conversely, the Government has at most a weak interest in deporting someone with meritorious claims to face persecution or torture, based on attorney error. As such, due process calls for a remedy for ineffective assistance of counsel in such circumstances. (*Id.* 25.)

In response, the Government offers variations on the argument that private counsel's errors cannot be imputed to the Government, all of which variations, as discussed in the Petition, are fatally flawed. (Opp. 10-12; Pet. 26-28.)

a. *First*, the Government cites *Coleman v. Thompson*, 501 U.S. 722, 752 (1991), claiming that it stands for the proposition that when "'[t]here is no constitutional right to an attorney' furnished by the government in a particular kind of proceeding, a

client 'cannot claim constitutionally ineffective assistance of counsel in such proceedings.'" (Opp. 10-11.) But the Court's opinion did not make the broad pronouncement that the Government suggests. Rather, the *Coleman* court held that due process did not require counsel, or the effective assistance of counsel, in state post-conviction (*i.e.*, collateral habeas) proceedings. 501 U.S. at 756-57. The Court expressly predicated its decision on prior substantive law that had found the "allocation of costs" for attorney error to be different on a habeas appeal than on direct criminal appeal, where fundamental fairness *does* dictate that a party not be deprived of liberty based on ineffective counsel. *Id.* at 754-57.

This case, unlike *Coleman*, involves a *direct* appeal of a proceeding that would deprive Petitioner of his liberty (and potentially his life, given the strong record evidence that he will be tortured if returned to Cameroon). Thus, the Government's reliance on *Coleman* begs the question presented here; *i.e.*, whether the Fifth Amendment's guarantee of fundamental fairness precludes the Government from deporting an alien with well-founded asylum, withholding of removal, and Convention Against Torture claims, due to procedural errors of his counsel. (Pet. i.) The Government does not cite any decision of this Court holding that reliance on such deportation proceedings would be constitutionally valid.[2] Indeed, a deportation proceeding—in which

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[2] The Government asserts, without citation to authority, that "there is no constitutional right to appointed counsel in immigration proceedings." (Opp. 11.) As the Petition notes, however, the (open) question of whether there is such a right in

the Government, as the sovereign, affirmatively seeks to deprive a party of his liberty interests—is akin to a criminal trial, and is unlike habeas. (*Id.* 15-16, 26-27.) *Coleman* is inapposite.

b. *Second*, the Government says that it "proves too much" to argue that a "due process violation in this context arises from the government's reliance on the removal order at the end of the proceeding," as "it would preclude the government from relying on any civil court order without exposing itself to the risk of collateral litigation about asserted malpractice on the part of opposing counsel." (Opp. 11.)

On its face, this argument rings hollow. As noted in the Petition, due process has required effective assistance in other, nominally "civil" contexts since the 1960s (Pet. 19-20), yet it goes without saying that the consequential breakdown in civil government prophesized by the Government has not occurred.

Moreover, Petitioner's argument—that the Government's reliance on tainted proceedings in order to deprive a party of liberty constitutes state action—is the same argument that has supported ineffective assistance claims in other contexts. *See, e.g.*, *Cuyler v. Sullivan*, 446 U.S. 335, 343-45 (1980) (holding that where retained counsel is ineffective, "a serious risk of injustice infects the trial itself" and

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certain removal proceedings is not presented here. (Pet. 27). Nor does it logically follow that there can be no due process remedy without a general right to appointed counsel, given both the balancing test used in assessing due process rights in civil cases, and the Government's policy and practice of directing aliens to obtain retained counsel and its affirmative efforts to facilitate aliens in retaining such counsel. (*See id.* 23, 27-28.)

"[w]hen a State obtains a criminal conviction through such a trial, it is the State that unconstitutionally deprives the defendant of his liberty"). Such an approach is appropriate in removal cases, where like a criminal trial, the state as sovereign is affirmatively seeking to deprive a defendant of liberty. (Pet. 18-21, 26.)

* * *

The Government's merits arguments are incorrect, not to mention premature. In all events, none are compelling enough to support denial of certiorari especially where, as here, seven circuit courts of appeals disagree with those arguments.

III. THE GVR URGED BY THE GOVERNMENT HOLDS OUT ONLY A HIGHLY UNCERTAIN PROSPECT OF RELIEF, AND DOES NOT JUSTIFY DENIAL OF CERTIORARI ON THE TWO CERTWORTHY QUESTIONS PRESENTED IN THE PETITION

The Government agrees that the Fourth Circuit's holding that the BIA lacked jurisdiction to fashion a remedy for ineffective assistance occurring at the petition-for-review stage was erroneous. (Opp. 16.) It thus asks that certiorari be denied on Question 1, the constitutional issue, but asks that the Court grant the petition for certiorari in Question 2, vacate the Fourth Circuit's judgment, and remand for further proceedings. (*Id.*)

The preferable course of action, however, would be for the Court instead to grant certiorari on both questions presented. This case squarely presents a core question of constitutional rights, and the corresponding issue of the BIA's ability to remedy

ineffective assistance.[3] Every federal appellate court that regularly reviews final orders of removal in immigration proceedings has now weighed in on the constitutional issue,[4] and the Fourth Circuit stands alone among the circuits in denying the BIA's jurisdiction to provide relief. Moreover, this case presents an ideal vehicle for resolving these questions, as Petitioner has a strong case on the merits and, but for the ineffective assistance, he would likely obtain the relief he seeks—a point that the Government does not dispute.

Nonetheless, it is by no means certain that Petitioner would obtain administrative relief upon remand; indeed, the Government only states that such relief "could" be available. (Opp. 10.) Notably, the respondent Attorney General has not exercised his own discretion (pursuant to authority not questioned below) to withdraw the BIA's order of removal and grant Petitioner administrative relief,

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[3] As the Government notes, there are other pending certiorari petitions challenging the Fourth Circuit's constitutional holding. (Opp. 13 n.4.) Those petitions, however, both appear to recognize that Mr. Afanwi's case is a better vehicle for review. *See* Pet. 10-11, *Massis v. Holder*, No. 08-1392 (U.S. filed May 8, 2009) (noting that "principal question" raised in petition is unrelated to ineffective assistance, and requesting that the Court "hold this case until it has decided whether to grant review in *Afanwi* and then dispose of this case consistent with its disposition of *Afanwi*"); *see also* Pet'r Reply, *Machado v. Holder*, No. 08-7721 (U.S. to be filed Sept. 10, 2009) (suggesting reasons why *Afanwi* is better vehicle).

[4] The Fifth Circuit, as the Government notes, has decided *not* to address the issue, based on the purported existence of an administrative remedy. *See Mai v. Gonzales*, 473 F.3d 162, 165 (5th Cir. 2006); *see also* Opp. 13 n.3.

an act that would have mooted this petition.[5] *See* 8 C.F.R. § 1003.1(h)(1)(i); *Xiao Xing Ni v. Gonzales*, 494 F.3d 260, 269 n.5 (2d Cir. 2007) ("the Attorney General can withdraw an order of the BIA for further review, thus depriving us of jurisdiction"); *Ren v. Gonzales*, 440 F.3d 446, 448 (7th Cir. 2006) (same; noting that such an act "render[s] the Board's decision nonfinal and hence not judicially reviewable").

Nor, of course, would a GVR compel the Fourth Circuit to reverse its position on the availability of the administrative relief that the Government now half-heartedly offers. *See, e.g., Tennard v. Dretke*, 542 U.S. 274, 282 (2004) (noting Fifth Circuit's reinstatement of prior opinion following GVR, requiring a second grant of certiorari followed by merits reversal). However, should this Court *hold* that the Due Process Clause demands a remedy, Petitioner will be guaranteed a remedy.

But granting certiorari on both questions presented will do far more than simply advance Petitoner's own interests. Both the existence and scope of the administrative remedy noted by the Government are effectively subject to the whim of the Attorney General, as has been illustrated vividly by

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[5] Moreover, such an act would have resulted in the vacatur of the Fourth Circuit's judgment under this Court's practice. *See United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950) ("The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss.")

the events of the last nine months, during which time the long-standing administrative remedy for ineffective assistance announced in *In re Lozada*, 19 I. & N. Dec. 637 (BIA 1988) was substantially curtailed by outgoing Attorney General Mukasey, only to be reinstated following the reconsideration of current Attorney General Holder. (*See* Opp. 6 n.1.)

Further, the existence of an administrative remedy does not provide nationwide uniformity as to the availability of relief from ineffective assistance of counsel, as the scope of the administrative remedy is not necessarily co-extensive with what due process requires. As such, aliens in the seven circuits that have recognized a Fifth Amendment right to effective assistance of retained counsel have additional protections that others, including Mr. Afanwi, do not, based simply on the accident of geography.

Both of these concerns would be addressed should the Court grant certiorari on both questions presented. Regardless of how the Court rules, it will be able to provide a uniform baseline for the scope and availability of a remedy for ineffective assistance of retained counsel in removal proceedings. Should the Court find that due process requires such a remedy, the availability of such relief will not be left to the discretion of the Attorney General. Conversely, if no such right exists, a clarifying decision by this Court would provide an impetus for the legislature and executive to determine whether the issue should be left to executive discretion or else codified into law—a strong possibility given the acknowledged problems with the immigration bar. (Pet. 15-17.)

If, but only if, the Court determines to deny review of both questions presented, it should grant, vacate, and remand in light of *Compean*, as the Government's brief urges. (Opp. 16.)

CONCLUSION

The petition for certiorari should be granted as to both Questions One and Two for a determination on the merits of both questions. In the alternative, if the Court determines it will not grant review as to either question, the Court should GVR as suggested by the Government's brief.

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